APPENDIX

Supreme Court of the United States

OCTOBER TERM, 1970

70-5061

No. ~~6401~~

THOMAS KIRBY (Otherwise Called Kirby Thomas),
Petitioner,

vs.

PEOPLE OF THE STATE OF ILLINOIS,
Respondent.

ON WRIT OF CERTIORARI TO THE APPELLATE COURT
OF THE STATE OF ILLINOIS, FIRST DISTRICT

PETITION FOR CERTIORARI FILED DECEMBER 31, 1970
CERTIORARI GRANTED MAY 24, 1971

Supreme Court of the United States

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INDEX

[Caption Omitted]

APPENDIX

Docket Entries

April 8, 1968

In the Circuit Court of Cook County. Return of Grand Jury in Case No. 68-1223 with indictment charging Thomas Kirby, otherwise called Kirby Thomas, and Ralph R. Bean with robbery:

> "in that they, by the use of force and by threatening the imminent use of force, took thirty dollars in United States currency and seven travelers checks from the person and presence of Willie Shard in violation of Chapter 38 Section 18-1, of the Illinois Revised Statutes 1967, . . ."

April 16, 1968

In the Circuit Court of Cook County. Defendant Thomas Kirby arraigned. Public Defender appointed as counsel. Plea of Not Guilty entered. Case assigned to Hon. L. Sheldon Brown for trial.

May 1, 1968

In the Circuit Court of Cook County. List of witnesses filed by state.

May 21, 1968

In the Circuit Court of Cook County. Motion of Thomas Kirby to Suppress the Identification Testimony of Witnesses.

In the Circuit Court of Cook County. Motion of Thomas Kirby to Suppress Physical Evidence.

June 27, 1968

In the Circuit Court of Cook County. Notice filed by state requiring Thomas Kirby to state his intention to assert the defense of alibi.

DOCKET ENTRIES

July 31, 1968

In the Circuit Court of Cook County. Plea of Not Guilty entered by Thomas Kirby. Jury called and sworn.

In the Circuit Court of Cook County. Hearing on Motion to Suppress Physical Evidence.

In the Circuit Court of Cook County. Hearing on Motion to Suppress Identification Evidence.

August 1, 1968

In the Circuit Court of Cook County. Opening arguments of counsel. Testimony of witnesses heard. Age of Thomas Kirby is 35 years. Motion of Thomas Kirby for directed verdict at close of People's case.

In the Circuit Court of Cook County. Motion for directed verdict denied. Further testimony of witnesses heard. Verdict of jury finding Thomas Kirby guilty as charged in the indictment.

In the Circuit Court of Cook County. Judgment entered on finding of guilty. Motion by Thomas Kirby for a new trial. Order denying motion for new trial. Motion of Thomas Kirby in Arrest of Judgment. Order denying motion in arrest of judgment.

In the Circuit Court of Cook County. Thomas Kirby sentenced to the Illinois State Penitentiary for not less than five nor more than twelve years.

August 9, 1968

In the Circuit Court of Cook County. Notice of Appeal by Thomas Kirby.

In the Circuit Court of Cook County. Motion by Thomas Kirby for appointment of counsel on appeal other than the public defender.

In the Circuit Court of Cook County. Order allowing motion for appointment of counsel. Order setting appeal bond at $20,000.

Docket Entries

November 26, 1968

In the Appellate Court of Illinois, First District. Record filed on appeal.

December 16, 1969

In the Appellate Court of Illinois, First District. Oral arguments heard.

March 10, 1970

In the Appellate Court of Illinois, First District. Opinion of court affirming judgment entered below filed.

May 4, 1970

In the Supreme Court of Illinois. Petition for Leave to Appeal filed by Thomas Kirby.

October 5, 1970

In the Supreme Court of Illinois. Order denying Petition for Leave to Appeal.

December 3, 1970

In the Supreme Court of the United States. Petition for a Writ of Certiorari to the Appellate Court of Illinois filed. Motion to proceed *in forma pauperis* filed.

May 24, 1971

In the Supreme Court of the United States. Motion to proceed *in forma pauperis* granted. Writ of Certiorari granted.

MOTION TO SUPPRESS IDENTIFICATION TESTIMONY OF A WITNESS FILED IN THE CIRCUIT COURT OF COOK COUNTY ON MAY 21, 1968

Now comes the defendant, Thomas Kirby, by his attorney, GERALD W. GETTY, Public Defender of Cook County, through Howard Abrams, Assistant Public Defender, and moves to suppress the identification testimony of any witness in this cause alleging that the confrontation wherein the defendant was identified violated the Constitutional Rights of defendant, in that:

1. The identification by the identification witness was induced by the actions of the police. The manner in which the police acted directly caused the identification witness to point out the defendant in violation of his Constitutional Rights under the Fifth and Fourteenth Amendments of the Constitution of the United States.

2. Defendant was not advised of his right to have counsel present with him at the time of the police confrontation in violation of his Constitutional Rights under the Sixth Amendment of the Constitution of the United States.

In support of defendant's contention, defendant cites the cases of *Stovall* v. *Denno*, 388 U.S. 250, (1967); *U.S.* v. *Wade*, 388 U.S. 218 (1967); *Gilbert* v. *California*, 388 U.S. 263 (1967).

WHEREFORE, defendant prays that this Honorable Court suppress the identification testimony of any witness in regard to identification of the defendant.

GERALD W. GETTY
Public Defender of Cook County

By: /s/ Howard Abrams
Assistant Public Defender"

STATE OF ILLINOIS)
) ss
COUNTY OF COOK)

IN THE CIRCUIT COURT OF COOK COUNTY
COUNTY DEPARTMENT—CRIMINAL DIVISION

Indictment No. 68-1223

Charge: Robbery, etc.

THE PEOPLE OF THE STATE OF ILLINOIS

—*vs*—

RALPH BEAN, KIRBY THOMAS

REPORT OF PROCEEDINGS—July 31, 1968

* * * *

[fol. 3] RALPH BEAN,

called as a witness on behalf of the Petitioner, having been first duly sworn, was examined and testified as follows:

DIRECT EXAMINATION

By Mr. Bean:

Q Would you state your name and address, please?
A Ralph Bean, 2100 West Warren.
Q Mr. Bean, calling your attention to February 22, 1968, were you in the vicinity of 2200 West Madison?
A Yes, I was.
Q And who were you with?
A Kirby Thomas.
Q What, if anything, happened while you were in the area of 2200 West Madison?
A We were walking west on Madison Street and we was stopped by two police officers.
Q Were you placed under arrest at that time?
A No, we was stopped for questioning
Q What was the questioning in regard to?

A They didn't give me any reason at all. They merely stopped us and asked us who were we.

Q What, if anything, did they do then?

[fol. 4] A He asked me my name and asked did I have any identification.

Q And what happened then?

A Well, I gave him identification stating who I was and he returned it back to me, and I stood right there by the car.

Q Did he show you a warrant for your arrest?

A No, he didn't.

Q Did you commit any crime just prior to this?

A No.

Q And what, if anything, did he do after that; the police officers?

A Well, after that they questioned the fellow I was with, and they placed us in the car—told him to get in the car, and the other officer said for me to get in the car, too.

Q Were you placed under arrest at that time?

A Yes, I assume we were.

Q Did the police take anything from you?

A Yes, they did.

Q What was taken from you?

A Some identification.

Q Where was the identification at?

A In my pocket, my coat pocket.

[fol. 5] Q And in what manner did the police obtain possession of this identification?

A He just went in my pocket and took it out.

MR. BEAN: That's all I have.

CROSS EXAMINATION

By Mr. Pomaro:

Q Mr. Bean?

A Yes, sir.

Q When the police officers stopped you on the street, what did they say to you?

A He said, "police officers."

Q And did they show you a picture?
A No.
Q Did they tell you that you resembled a suspect in a picture?
A No, he didn't.
Q Did they ask for your identification?
A Yes, he did.
Q And did they subsequently retrieve some identification?
A Yes.
Q And did that identification have your name on it?
A No.
[fol. 6] Q It had the name of Mr. Willie Shard, didn't it?
A That's correct.
Q And they recovered some traveler's checks, also, I believe, from you?
A No.
Q What else did they take from you besides identification?
A That's all.
MR. BEAN: Objection. It is irrelevant on a motion to suppress.
THE COURT: All right, he's answered.
MR. POMARO: Q The identification they did take from you had the name of Willie Shard on it?
A Yes.
Q Your name is not Willie Shard, is it?
A No.
MR. POMARO: Nothing further.
THE COURT: Anything further of this witness?
MR. BEAN: No, your Honor.
THE COURT: You may step down.

(Witness excused.)

[fol. 7] KIRBY THOMAS,

called as a witness on behalf of the Petitioner, having been first duly sworn, was examined and testified as follows:

DIRECT EXAMINATION

By Mr. Bean:

Q State your name and address?
A Kirby Thomas.
Q Were you in the area of 2200 West Madison on February 22, 1968?
A I was.
Q And were you stopped by the police at that time?
A I was.
Q And what, if anything, did the police say to you when they stopped you?
A They asked—they identified themselves.
Q And did they tell you they had a warrant for your arrest?
A No.
Q Did they state they had seen you commit a crime in their presence?
A No.
Q What happened after the police stopped you?
A They began to search my person.
MR. BEAN: That's all I have.

[fol. 8]

CROSS EXAMINATION

By Mr. Pomaro:

Q Did they recover anything when they searched your person?
MR. BEAN: I will object to this as to relavancy. The only question is whether or not the search was legal.
THE COURT: If there was no recovery on the search there is no occasion to suppress anything. What are you going to suppress?
MR. POMARO: Q Did they recover anything when they searched your person?
A Well, when they went through my personal identification they recovered some travelers checks.
Q And the personal identification didn't have your name on it, did it?
A It certainly did.
Q It did? Are you sure about that?
A I certainly am.

Q Did those travels checks have your name on them?
A No, they didn't.
Q Whose name did they have on them?
A Shard.
Q Willie Shard; right? Did he tell you that you and [fol. 9] your partner resembled a picture of a wanted man?
A No.
Q Wanted for robbery?
A No.
Q They didn't tell you that?
A No.
Q You didn't know that?
A Would you repeat that?
Q Did you know that?
A Did I know what?
Q That either you or your partner resembled the picture of a wanted man for robbery? Did you know that? For a con game; did you know that?
A Well, I had a hearing on March 24th or 25th in Branch 44. This is when I was informed of that.
Q You didn't know it then?
A No.
MR. POMARO: Okay. Nothing further
MR. BEAN: No redirect.
THE COURT: You can step down.

(Witness excused.)

* * * *

[fol. 10] BIAGGIO PANEPINTO,

called as a witness on behalf of the Respondent, having been first duly sworn, was examined and testified as follows:

DIRECT EXAMINATION

By Mr. Pomaro

Q State your name, sir?
A Officer Biaggio Panepinto.
Q What is your business or occupation?

A I work for the Public Vehicle Department, City of Chicago Police Department.

Q And how long have you been so employed?

A Of this unit?

Q By the Chicago Police Department?

A I am going on my 11th year.

Q What is your badge number?

A 6893.

Q Will you speak into the microphone, please.

Calling your attention to February 22, 1968, were you so assigned?

A Yes, I was.

Q Officer, calling your attention to that date, did you have occasion to be on duty in a squadcar?

A Yes, I was.

Q And did you have occasion to see the defendants [fol. 11] Dean and Kirby?

A On that day, yes, I did.

Q And do you see them in Court today?

A Yes, sir, I do.

Q Point them out, please?

A The two gentlemen sitting there. (Indicating)

MR. POMARO: Indicating for the record the defendants Bean and Kirby.

Q And where were you at the time you saw them, sir?

A As this time my partner and I were eastbound and—

Q Were you on foot or in a squadcar?

A We were in a squadcar, unmarked car.

Q What was your partner's name?

A Officer James Rizzi.

Q All right. What happened next?

A At this time we were eastbound in the 2200 block when we first observed the two gentlemen.

Q And what happened next?

A Well, at this time I told my partner, I said, "Gee, that looks like Alphonzo Hampton who is wanted in the first area for con game. And I make a "U" turn and we stopped the two defendants at 2214 West Madison Street.

Q And how did you happen to become aware of this [fol. 12] Alphonzo Hampton?

A The police department issues daily bulletins every day, and I had one of those bulletins in my possession that they issued.

Q Did this bulletin contain a photograph of this suspect?

A It did.

Q And where was this bulletin?

A This bulletin was on my clipboard.

Q The clipboard was with you in the vehicle?

A Yes, sir, it was.

MR. POMARO: Mr. Reporter, please mark this Respondent's Exhibit 1, for identification.

(Thereupon, a photograph was marked by the reporter as Respondent's Exhibit 1, for identification.)

MR. POMARO: Q I show you what has been marked as Respondent's Exhibit 1, for identification, a photograph, and ask you to look at that. Have you ever seen that before?

A Yes, I have.

Q And where was that, sir?

A This was at the time, in the squadcar.

Q And is that the photograph in the police bulletin [fol. 13] that you have spoken about previously?

A That's correct.

Q And is that in the same condition now as it was on the date and time in question?

A It is.

Q Now, may I have that back.

Does that photograph resemble one of the two defendants?

A Yes, it did.

Q And which defendant?

A Kirby Thomas.

Q What happened next, Officer?

A At this time we stopped them and identified ourselves. We asked them to identify themselves, too.

Q What did they say to you, if anything?

A We asked them to show some identification and at this time Kirby—I questioned Kirby Thomas and he took his wallet out, and as he was looking for identification I noticed three travelers checks with the name of Willie on it. And I asked who these belonged to. And he said, "Oh, that's play money." So I said, "Would you let me see them", so he showed them to me and it had Willie [fol. 14] Shard on there. I said, "Who is Willie Shard?" He said, "I won it in a crap game."

At this time we asked them to show more identification and I noticed a social security card with Willie Shard on it, too. So we ordered them into the auto.

Q Was the other suspect, Mr. Bean, searched?

A Mr. Bean was also searched by my partner, and I was present. And in his possession he had a blue cross and blue shield membership card with Willie Shard on it, a Greyhound receipt for a ticket, also a prescription card from a drug store, and also a social security duplicate of Willie Shard.

Q Was Mr. Bean asked for identification?

A He was.

Q And what was his reply?

A He had no identification with his name on it.

MR. POMARO: Your witness.

CROSS EXAMINATION

By Mr. Bean:

Q Officer, do you keep all these daily bulletins with you in the squadcar?

A I do.

Q And this bulletin was issued in July, 1967, is that [fol. 15] correct?

A That's correct.

Q All right. Now, under the suspect you have here of Alphonzo Hampton, you have a description, is that correct?

A That's correct.

Q And what is the description?

A Male, negro, 35, 5 foot 2, 125 pounds, slender build, medium, dark complexion.

MR. BEAN: Would you stand up, Officer.

Q What would you say the height of Mr. Kirby is?

A Just by looking at him, I would say he is about five, five.

Q Now, Officer, you say you asked Mr. Kirby for identification and he showed you identification?

A Well, he started to show me when I first noticed the travelers checks.

Q And in what manner were the travelers checks in the wallet, Officer?

A In what manner?

Q Yes. How were they in the wallet?

A They were longways, full length in the wallet. As he opened it up I noticed the name.

Q Had you ever at any time prior to that taken the [fol. 16] wallet out of the defendant's hand?

A Yes. Not at that time. This was done at Area 4, robbery.

Q And prior to the time you placed the defendants under arrest, did you search them for weapons or anything?

A Before we placed them under arrest?

Q Yes.

A No.

Q And when you first stopped them, Officer, did you ask them if they were, if the defendant Kirby was Mr. Hampton?

A The first time I asked him, I said, "Are you Alphonzo Hampton?" He said, "No." I said, "You sure look like Hampton." I said, "Show some identification."

Q You never at any time took, the wallet out of the defendant's possession before you saw the travelers checks?

A No, I did not.

MR. BEAN: That's all I have.

MR. POMARO: No further questions.

(Witness excused.)

MR. POMARO: Call Officer Rizzi to the stand.

[fol. 17]

JAMES RIZZI

called as a witness on behalf of the Respondent, having been first duly sworn, was examined and testified as follows:

DIRECT EXAMINATION

By Mr. Palmaro:

Q State your name, please?
A Officer James Rizzi.
Q What is your business or occupation?
A Police Officer, City of Chicago.
Q How long have you been so employed?
A Eleven years.
Q What is your badge number?
A 7515
Q And what is your current assignment?
A Public Vehicle Unit.
Q Calling your attention to February 22, 1968, were you so assigned?
A Yes, I was.
Q Calling your attention to that date, did you have occasion—were you on tour in your squad car that day?
A Yes, we were.
Q And with whom were you in the squadcar?
A With one Officer Panepinto.
[fol. 18] Q And did you have occasion to see the defendants here on trial today, Mr. Bean and Mr. Kirby?
A Yes.
Q Do you see them in court today?
A Yes, I do.
Q Will you point them out, please?
A The two colored gentlemen sitting there. (Indicating)
MR. POMARO: Indicating for the record, the defendants Bean and Kirby.
Q Would you please tell us what, if anything occurred, at the time you saw the defendants?
A We were eastbound and approaching the 2200 block, and my partner says, "Gee that guy looks like Hampton."

And as we made a "U" turn to come back then we stopped and questioned these gentlemen.

Q And did you get out of your squadcar, sir?

A Yes, I did.

Q Did your partner get out of the squadcar?

A Yes, he did.

Q What, if anything, was said at that time?

A He asked Kirby for identification. First he said, "Are you Hampton?" And he said, "no." He said, "Let me see some identification."

[fol. 19] Q What happened then?

A Well, Kirby pulled out a wallet, a block wallet, and then my partner said something about some checks. I was watching Bean.

Q What happened next, if anything?

A Well, then I asked Bean for his identification. He said he didn't have any, and I went and searched him.

Q And what did you find, sir?

A In his coat pocket I found some identification. And he had a blue cross card with Shard's name on it, and a Greyhound bus ticket and a prescription, medical prescription with Shard's name on it, and he had a social security card, blank, to the other part of the social security card.

Q Did you ask him what his name was?

A Yes.

Q What did he tell you?

A Bean.

Q Did he have any explanation for the identification of another person?

A At the time I believe he said he found it. I am not sure now.

MR. POMARO: Thank you, Officer. Your witness.

[fol. 20]

CROSS EXAMINATION

By Mr. Bean:

Q Officer, you have been in Court during the time your partner testified just previously?

A Yes.

Q Officer, did you show either one of the defendants this daily bulletin?

A My partner did.
Q He showed it to them?
A Yes.
MR. BEAN: That's all I have.
MR. POMARO: Nothing further.
THE COURT: Step down.

(Witness excused.)

* * * *

[fol. 25]

RALPH BEAN,

called as a witness on behalf of the Petitioner, having been first duly sworn, was examined and testified as follows:

DIRECT EXAMINATION

By Mr. Bean:

Q State your name and address?
A Ralph Bean, 2100 West Warren.
Q You were arrested on this charge, is that correct, and charged with robbery?
A There never was any charge, they merely said for investigation.
Q Did the police officers inform you that you had a right to have an attorney present prior to be identified by the victim?
A No, they didn't.
MR. BEAN: That's all I have, Judge.
MR. POMARO: No questions.

(Witness excused.)

[fol. 26]

KIRBY THOMAS,

called as a witness on behalf of the Petitioner, having been first duly sworn, was examined and testified as follows:

DIRECT EXAMINATION

By Mr. Bean:

Q You are the same Mr. Kirby that was previously sworn?

A Yes.

Q You understand you are still under oath?

A Yes.

Q Would you state your name and address, please?

A Kirby Thomas.

Q And after you were placed under arrest on February 22nd, were you advised of your right to have an attorney present prior to being identified?

A No.

MR. BEAN: That's all, your Honor.

MR. POMARO: No questions.

(Witness excused.)

* * * *

[fol. 50]

WILLIE SHARD,

called as a witness on behalf of the People, having been first duly sworn, was examined and testified as follows:

DIRECT EXAMINATION

By Mr. Pomaro:

Q State your name, please?

A My name is Willie Shard.

Q Spell your last name, please?

A S-h-a-r-d, Shard.

Q Mr. Shard, would you speak more slowly and loud and clear, so the ladies and gentlemen can understand you and hear you.

A Yes.

[fol. 51] Q Where do you live?

A 2120 West Washington Boulevard.

Q Slow down, Mr. Shard.

Are you employed, Mr. Shard?

A Right.
Q And by whom are you employed?
A Artistic Wood Specialty.
Q Artistic Wood Specialty.
A Wood working.
Q And how long have you worked for them, Willie?
A Eight years.
Q Willie, calling your attention to February 20, 1968, about four-thirty in the afternoon, do you remember where you were then?
A Yes, I do.
Q Where were you, Willie?
A I was on Hoyne Street going toward Warren, between Warren and Madison, on Hoyne.
Q You were on Hoyne Street between Madison and—
A And Warren.
Q And you were walking towards Warren?
A Correct.
Q Was this going north or south?
A I was going north.
[fol. 52] Q What side of the street were you on?
A On the west side of the street.
Q And where were you going?
A I was going from a friend, to the restaurant.
Q To a restaurant?
A Yes.
Q And did anything unusual happen at that time?
A Yes, sir, it did.
Q What was that, Willie?
A Well, I looked back and I seen two men. I didn't know exactly whether they were following me or what. I seen them coming down the street. I seen them about fifteen feet away from me.
Q Did you look at both the men?
A Yes, I looked at both the men.
Q Did you see the men?
A Did I see them?
Q Yes.
A Yes.
Q All right. What was the weather like that day? Was the sun shining or was it raining?

A No, all I know it was day time, around, about four-thirty.

Q Was it bright out?

[fol. 53] A Yes, it was light.

Q Did you see the men well?

A Yes.

Q What happened then, Willie?

A Well, when I stepped off the sidewalk, took a step up the steps to go into the restaurant, I don't know which one it was, but one of them ran up and grabbed me.

Q Where did he grab you?

A Around my neck.

Q What happened next, Willie?

A The next one went into my pockets and taken everything I had.

Q And what did they take out of your pocket, Willie?

A Well, they taken $140 in travelers checks and around, about thirty or thirty-five dollars in cash, my wallet and all my identification cards.

Q What happened next, Willie?

A Well, when they turned to leave they went north on Hoyne Street.

Q What direction did you go, Willie?

A Well, I turned around and went back towards Madison.

Q You went south?

[fol. 54] A Correct.

Q You went in the opposite direction, is that correct?

A What is that?

Q You went in the opposite direction they went, is that correct?

A Right, correct.

MR. POMARO: Mr. Court Reporter, would you please mark this as People's Exhibit 1, for identification.

(Thereupon, said item was marked by the reporter as People's Exhibit 1, for identification.)

MR. POMARO: Q Mr. Shard, I show you People's Group Exhibit 1, for identification, purporting to be a social security card and three travelers checks, and ask you if you have ever seen this before?

A Yes, I have.
Q And whose social security card is that?
A That's mine, belongs to me.
Q These are your travelers checks?
A Yes.
Q Whose name appears on those travelers checks?
A Willie Shard.
Q How many travelers checks are there, can you see?
[fol. 55] A Three.
Q And how much is each one of them?
A Twenty dollars each.
Q And that's your signature on those travelers checks?
A Correct.
Q And are these in the same condition now as when you last saw them?
A Yes, they are.
Q These are the ones taken from you in the robbery?
A Correct, right.
Q All right, thank you.
Willie, after the men robbed you and they went north and you went south on Hoyne, what happened next?
A I walked over to the drive store. In fact, I seen an officer coming down the street, a police car, and I whistled for him. I guess he must not have heard me. So I went into the drug store.
Q Did you have any money on you at this time?
A Not a penny. I went into the drug store and a gentleman there I had known for a long time, about twenty years, so I got car fare from him and I went back to where I was living 909 West Madison—901 West [fol. 56] Madison.
Q Did you eventually go to the police station?
A No, because I didn't have any money. I went the next day.
Q Did you go to the police station the next day?
A The next day I walked.
Q You walked to the police station?
A Yes.
Q How far did you walk?
A I walked from Madison over to Clark Street and Chicago Avenue.

Q And did you report the crime there?
A Yes, I did.
Q All right. Now, Willie, calling your attention to February 22, 1968, did you receive a call from the police asking you to come down to the station?
A Yes, I did.
Q And when you went down to the station, was that the Maxwell Street Police Station?
A Correct.
Q When you went down there, what if anything, happened, Willie?
A Well, I seen the two men was down there who robbed me.
[fol. 57] Q How did that happen? Who did you go to the police station with?
A I didn't get that.
Q Who took you to the police station?
A The policeman picked me up.
Q And did any of them tell you—
MR. BEAN: Objection, Judge.
THE COURT: Sustained.
MR. POMARO: Q When you went to the police station did you see the two defendants?
A Yes, I did.
Q Do you see them in Court today?
A Yes, sir.
Q Point them out, please?
A Yes, that one there and the other one. (Indicating)
MR. POMARO: Indicating for the record the defendants Bean and Kirby.
Q And you positively identified them at the police station, is that correct?
A Yes.
Q Did any police officer make any subbestion to you whatsoever?
MR. BEAN: Objection, Judge.
[fol. 58] THE WITNESS: No, they didn't.
THE COURT: I'll let it stand.
MR. POMARO: Q These events that you testified to, Willie, did they occur in the City of Chicago, County of Cook and State of Illinois?

A I didn't get that.

Q The matters that you have testified to, did they occur in Chicago, Cook County, Illinois? Did these things happen in Chicago?

A Yes.

Q Cook County?

A Yes.

Q And Illinois?

A Right.

MR. POMARO: Thank you.

MR. BEAN: May I have a side bar conference, your Honor?

(Thereupon, the following proceedings were had outside the hearing of the jury:)

MR. CUSICK: Let the record reflect that we have submitted a copy of a police report and the Grand Jury testimony applicable to this case to defense counsel at this time.

(Thereupon, the following proceedings were had with-
[fol. 59] in the presence and hearing of the jury:)

CROSS EXAMINATION

By Mr. Bean:

Q Mr. Shard, just before this happened that you were robbed, where had you been before that?

A I had been to New Orleans.

Q I mean, on the day that this happened, where were you coming from?

A I had come back from New Orleans.

Q And you were coming from the airport or where?

A No, Greyhound Bus Station.

Q And these people that robbed you, they were walking behind you, is that correct?

A Yes, they was behind me. I didn't know exactly was they following me or not. I remember seeing them behind me. I looked back.

Q You stated on direct examination that you got a real good look at them?

A Yes, I did.

Q How was that? Were they close to you when you turned around, or what was the condition for you to get a good look at them?

A I would say they were about the distance from me [fol. 60] to where you are standing.

Q And they were that far when you turned around and looked at them?

A Yes.

Q After this happened, the next day you went down to the police station, is that correct?

A Correct, next morning.

Q The next morning. Now, did you give the police a description of these people?

A Yes, I did.

Q And how did you describe them to the police?

A Well, I don't know, I said they were both about the same height, I said about five, six or five, seven, something like that.

Q And anything else?

A I said they was brown skinned, dark brown skin, about 140, 150 pounds, something like that.

Q So you told the police they were five feet six inches tall?

A Something like that.

Q And each weighed what?

A What?

Q How much did each of them weigh?

[fol. 61] A Around, about 150, 140 or 150.

Q 140 to 150 pounds?

A Right.

Q That's what you told the police?

A Yes.

Q And the police made a report on it?

A Right.

Q Did you tell the police what they were wearing, or anything?

A Well, no, I didn't see correctly what they was wearing, how they was dressed.

Q You didn't observe what they were wearing, regarding their clothing, trousers, or anything?

A Right.
Q You didn't see what they were wearing?
A No.
Q You looked at them when they were going away, right?
A I was headed north on Hoyne and they was headed in the same direction, going towards Hoyne.
Q Now, on the 22nd, the day after you reported it, you went down to the police station. Who took you to the police station?
A The policeman picked me up.
[fol. 62] Q And who was that policeman?
A Well, I really doesn't know the name, I forget the name, but I know the Maxwell Street Police Station. This gentleman. (Indicating)
Q This police officer in Court now?
A Yes, and his friend.
Q And what did they tell you whenever they picked you up?
A They didn't tell me anything. They just asked me was I robbed and I said, "yes." They said, they asked me did I know them if I seen them and I told them "yes."
Q When did this happen; down at the police station?
A No. When they picked me up they asked me the questions. They said, were you robbed and I said "yes."
Q What else?
A Could I identify them and I told them "yes".
Q All right. Then I presume you went down to the police station?
A They was sitting down there when I first walked in.
Q They were sitting down?
A Yes, at the desk, that's right.
Q And did the police officers say anything to you?
[fol. 63] A They asked me to point them out and I pointed them two guys out.
Q They asked you if these were the ones?
A Right.
Q How many other people were sitting there?
A I didn't pay much attention.

Q They asked you if these two, Kirby and Bean, were the ones?

A Correct, yes.

THE COURT: Would you repeat the question, Mr. Court Reporter.

(Question read by the reporter as follows: "They asked you if these two, Kirby and Bean were the ones?")

MR. BEAN: Q Now, before that, before they asked you if Kirby and Bean were the ones, did they ask you if two other people were the ones that robbed you?

A Did they ask me what?

Q Did they ask you—did they point out two other people and ask you if they were the ones who robbed you?

A No.

Q They just asked you if Kirby and Bean were the [fol. 64] ones?

A Yes.

Q Now, whenever you gave a description to the police, they took all this down, is that correct?

A What is that?

Q Whenever you gave a description, on the 21st, the day after you were robbed, you gave a description of the people who robbed you to the police?

A Right.

Q And he took all this down?

A Yes.

MR. CUSICK: Objection. There would be no way he would know what the police took down.

THE COURT: Sustained.

MR. CUSICK: We ask that the answer be stricken.

THE COURT: The answer is stricken and the jury is instructed to disregard it.

MR. BEAN: Q Do you recall testifying, Mr. Shard, at a preliminary hearing on the 25th of March, before Judge Ryan down on the fourth floor here?

A Yes.

Q You testified there?

A Yes.

Q And you were under oath there as you are here, [fol. 65] is that correct?

A Right.

Q All right. Did you answer the question of the State's Attorney down there, "Did you see either or both of the men at the time?" Your answer is, "When I looked back I seen them but I didn't pay any attention. I was going to get me something to eat. The minute I stepped on the sidewalk, one of them run and grabbed me around the neck"?

A Right.

Q "What did they do? "Both of them ran their hands in my pocket and taken my money".

A Right.

Q That is what you testified to there?

A Correct.

Q You also testified at the Grand Jury?

A Correct. That was on the 5th of April.

Q Pardon me?

A That was on the 5th of April, the Grand Jury.

Q Right.

A On Friday, yes, I remember.

Q You stated there, "I was going between Warren and Madison and I happened to look back and I seen two guys coming but I didn't know what was going on"? [fol. 66] A Yes.

Q "By the time I stopped off the street to get something to eat, I didn't know which one it was, but one of them ran up and grabbed me around the neck."

A Yes.

Q Did these people grab you from behind?

A Yes, they did.

Q But you did see enough of them so you could give the police a description?

A Yes, I did.

Q Now, did the police, when they took you down to the police station, say they had two suspects they wanted you to look at?

A Never told me that. There was some more people in there but I wasn't paying attention.

Q But they told you they had two suspects for you to look at?

A Yes, correct.

Q Did they tell you anything else, that some travelers checks had been found on them?

A No.

Q Now, before you testified here, did you talk at any time with the State's Attorney?

A [redacted] more than here.

[fol. 6[redacted]] Q Before testifying today, did you have any discussion with them?

A Yes.

Q And when was that?

A Well, yesterday, today, and I think the last time I was here on the 5th of April.

Q And about how long a time did you spend with the State's Attorney?

A I didn't pay no attention to the time. I know we was sitting down talking.

Q Was it an hour?

A I wouldn't say, exactly. I could have been maybe that long and maybe longer, or shorter.

Q But you say you got a good enough look at the persons to give the police a description?

MR. CUSICK: Objection.

THE COURT: Sustained. Asked and answered.

MR. BEAN: That's all I have.

REDIRECT EXAMINATION

By Mr. Pomaro:

Q Willie, how tall are you?

A Five—simething between five, four and five, five.

Q What do you weigh, Willie?

A About 117, 120.

[fol. 68] Q Willie, when you looked back, when you were walking down the street and first saw the defendants, when you looked back, did you see them then?

A Yes, I seen them.

Q Did you get a good look at them then?

A Yes, I did.
Q All right. Now, when they grabbed you and took your money, did you see them then?
A Yes, I did.
Q Did you get a good look at them then?
A Yes.
Q Both of them?
A Correct.
Q When they walked away did you see them then?
A Yes.
Q Did you look at them, Willie?
A Yes.
Q Did you get a good look at them?
A Yes.
Q Are those the same two fellows? Look at them, Willie.
A Correct.
Q Are those the same two that robbed you?
A Yes.
[fol. 69] Q You are sure, Willie?
A Yes.
Q Willie, I talked to you this morning about this case, didn't I?
A Yes.
Q And I talked to you yesterday about this case, didn't I?
A Right.
Q And did I ever tell you what to say?
A No.
Q Did I ask you questions?
A Yes, you asked me questions.
Q Did I ever tell you what to say?
A No, you haven't.
MR. POMARO: Thank you. Nothing further.
THE COURT: Anything further, Mr. Bean?
MR. BEAN: Nothing else.
THE COURT: You may step down.

(Witness excused.)

MR. CUSICK: The State will call Officer Rizzi.

[fol. 70]

JAMES RIZZI,

called as a witness on behalf of the People, having been first duly sworn, was examined and testified as follows:

DIRECT EXAMINATION

By Mr. Cusick:

Q State your name, please?
A Officer James Rizzi.
Q And how do you spell your last name?
A R-i-z-z-i.
Q What is your occupation?
A Police officer, City of Chicago.
Q How long have you been on the force?
A About 11 years.
Q Were you so employed on the police force during the month of February, 1968?
A I was.
Q Calling your attention to February 22, 1968, at about eleven o'clock in the morning, where were you?
A We were westbound on Madison Street.
Q And were you in a squadcar?
A Yes, we were.
Q Who were you with?
A My partner, Officer Panepinto.
[fol. 71] Q Who was driving the car?
A I was.
Q And what, if anything, occurred there?
A Well, we were going east on Madison Street, approaching the 2200 block and my partner says, "there goes a guy that looks like he's on the Daily Bulletin, a picture in the Daily Bulletin. I made a "U" turn and the two men were stopped.
Q Now, the two men that you stopped at that particular point, do you see them here in Court today?
A Yes, I do.
Q Would you point to them, please, and identify them?

A The one with the gray sweater is Kirby Thomas and the one with the red sweater is Ralph Bean.

Q Now, this was daylight, is that correct?

A Right.

Q When you got out of the car did you have a conversation with them?

A My partner did.

Q And who was your partner talking to?

A He was talking to Kirby Thomas.

Q And did you overhear anything that was said?

A Yes, I did.

[fol. 72] Q And what was said?

A He asked him to produce his identification, who he was.

Q And what happened?

A Well, he pulled out his wallet and he opened it up and there was three American Express Travelers Checks in the money part, in the folding part. My partner asked him, "What is this?" He said—

MR. BEAN: Objection, Judge, I think this is hearsay.

THE COURT: I beg your pardon?

MR. BEAN: Objection, hearsay.

THE COURT: Is this in the presence and hearing of the defendant?

MR. CUSICK: That's right.

THE COURT: Is that right?

THE WITNESS: Yes, sir.

THE COURT: All right, go ahead. Overruled.

THE WITNESS: He said, "What is this"? He said, "This is play money." My partner pulled the check out and read Willie Shard, and he said, "Who is Willie Shard?" He said, "Oh, I won it in a crap game."

MR. CUSICK: Q And what happened next?

A The two men were placed under arrest and transported to the fourth area.

[fol. 73] Q When you arrived at the station—first of all, let me show you People's Group Exhibit 1, for identification. Does this look in any way similar to anything you have ever seen before? Examine it, please.

A Yes.

Q And what does it resemble?
A It resembles the checks.
Q Is there a name of the travelers checks?
A Yes.
Q And whose name is that?
A Willie Shard.
Q And do you see anything else there besides the travelers checks?
A Yes, a social security card.
Q And whose name is on the social security card?
A Willie Shard.
Q And where was this recovered initially?
A Off Ralph—I mean Kirby Thomas' wallet.
Q Officer, when you arrived back at the station, did you make an investigation to determine if these checks had been stolen or not?
A Yes, I did.
Q And what did your investigation reveal?
A Our investigation revealed that the checks were [fol. 74] taken in a robbery of Willie Shard.
Q Now, were the defendants brought to any particular room inside the station?
A Just a big open room, near the window.
Q Were they standing or seated?
A They were seated.
Q Now, later on, or sometime later, did you eventually see Mr. Shard walk into the police station?
A Yes, sir, a couple of hours later.
Q And when he walked in, will you describe what happened?
A He walked in and he said; "Those are the two men that robbed me."
Q Now, did anyone prompt him or coach him prior to his walking in the room, if you know?
A No, sir.
Q And what did he say the instant he walked in the room and saw them?
A He said, "These are the two men that robbed me."
Q Did you direct the two men to stand up?
A After that, yes.
Q And what happened next?

A He said, "These are the men."

Q Now, everything you testified to occurred in the [fol. 75] City of Chicago, County of Cook, State of Illinois?

A Yes, sir.

MR. CUSICK: Your witness.

CROSS EXAMINATION

By Mr. Bean:

Q Now, Officer, were you involved in this case prior to the 22nd, which was two days after the robbery?

A No, sir.

Q So you did not take down any police reports that the complaining witness made on the 21st?

A No, sir.

Q Whenever you brought the complaining witness down to the police station, did you tell him for what reason you were bringing him down there?

A I didn't bring him down there. I mean, you mean the defendants?

Q I'm sorry, I mean the complaining witness, Mr. Shard?

A I didn't bring him.

Q You did not bring Mr. Shard down there?

A No.

MR. BEAN: That's all I have, your Honor.

THE COURT: Anything else?

[fol. 76] MR. CUSICK: Nothing further.

THE COURT: You may step down.

(Witness excused.)

MR. CUSICK: At this time the State will call Officer Panepinto.

BIAGGIO PANEPINTO,

called as a witness on behalf of the People, having been first duly sworn, was examined and testified as follows:

DIRECT EXAMINATION

By Mr. Cusick:

Q Officer, State your name and area assignment?

A My name is Biaggio Panepinto and I work for the Public Vehicle Unit, Chicago Police Department.

THE COURT: Just a moment. Will you spell you name, please, slowly.

THE WITNESS: First name, B-i-a-g-g-i-o. My last name is P-a-n-e-p-i-n-t-o.

MR. CUSICK: Q And how long have you been with the police department, sir?

A October 1st, it will be eleven years.

Q October 1, 1968?

A 1968.

Q Were you so employed during the month of Febru-
[fol. 77] ary, 1968?

A I was.

Q And calling your attention specifically to February 22, 1968, were you at or near the 2200 block of west Madison Street?

A Yes I was.

Q And approximately what time was that?

A Approximately eleven a.m.

Q In the morning?

A In the morning.

Q And were you driving or a passenger?

A I was driving in an unmarked vehicle.

Q I see. And what happened next, if anything?

A Well, at this time we were in the 2200 hundred block of Madison Street when I observed the two defendants walking west on Madison Street, and I told my partner that one of the men looked like a man that was wanted on the Daily Bulletin.

Q And who was the man that was wanted on the Daily Bulletin; what was his name?

A His name was Alphonzo Hampton.

Q And when you thought that one of the defendants looked like Hampton, which defendant were you referring to?

[fol. 78] A Kirby Thomas, the man to my left, in the gray sweater.

Q In the gray sweater?

A Yes.

Q And who was with him at that time?

A Ralph Bean.

Q And do you see him in the Courtroom today, also?

A Yes, the man in the red jacket there. (Indicating)

Q Now, what happened next?

A And this time, my partner made a "U" turn, he was driving. And as we approached them we stopped the auto, and we approached the two defendants and we identified ourselves.

Q Did you have a conversation with Mr. Kirby?

A Yes, I did.

Q And what was the substance of that conversation?

A I asked him to identify himself, and he took his wallet out and as he opened his wallet I noticed American Express checks.

Q Did you ask him what they were?

A Yes, and he told me that they were play money. I said, "Let me see them." At the same time he pulled them out I took them from his hand, and I noticed it had the name of Willie Shard on it.

[fol. 79] Q What happened next?

A Then I asked him, "Where did you get these checks, these don't belong to you?" And he said that he won them in a crap game.

Q And did he later produce any identification for himself, for Mr. Thomas, I am referring to?

A Yes.

Q How did he identify himself?

A Would you repeat that again?

Q Well, I will withdraw that question.

Did Mr. Kirby Thomas identify himself as Mr. Kirby Thomas or as Thomas Kirby?

A Yes, he had another identification on him with the name Kirby Thomas.

Q I see. And the explanation for the travelers checks was that he won them in a crap game, is that correct?

A Yes.

Q Now, I will show you People's Group Exhibit 1, for identification, and ask you if you have ever seen that before?

A Yes, these are the same ones I took from Thomas Kirby.

Q And will you describe to the ladies and gentlemen [fol. 80] exactly what you have in your hand?

A It is an American Express Company check for the amount of twenty dollars.

Q How many checks are in there?

A There are three of them in here.

Q Made out to who?

A They are made out to—it is signed by Willie Shard.

Q Is there anything else in that exhibit besides the checks?

A Yes, there is a social security card with the name Willie Shard, and it is signed.

Q And you are positive that this Group Exhibit 1 is the same items that you took from the defendant, Mr. Kirby, at the scene of the arrest?

A It is.

Q Now, what did you do with the evidence that you recovere from the defendant, specifically People's Exhibit 1?

A We inventoried it and sent it down to the Custodian.

Q And when did you retrieve it?

A Yesterday, 31st of July.

[fol. 81] Q Now, when you returned to the station—was this the 22nd of February?

A Yes.

Q When you returned to the station did you make an investigation of the travelers checks?

A I didn't quite get you.

Q When you returned to the station, did you make an investigation of the travelers checks?

A Yes, I did.

Q And after your investigation what did you determine?

A That the American Express checks had been taken in a robbery for a man by the name of Willie Shard.

Q Were you interrogating the defendants in the police station?

A We were.

Q Subsequent thereto, did Mr. Willie Shard enter the room?

A We were talking to the two defendants when Willie Shard walked in.

Q What was the first thing that Mr. Shard said?

A He said the two men sitting at the table were the two men that robbed him.

Q And as far as you are concerned, did anybody [fol. 82] prompt him to identify him?

A No.

Q Was his identification instantaneous?

A Yes, it was.

Q And everything you testified to occurred in Chicago, Illinois, County of Cook?

A Yes, sir.

MR. CUSICK: Your witness.

CROSS EXAMINATION

By Mr. Bean:

A Officer, the reason you stopped Mr. Kirby and Mr. Bean was for another party who turned out not to be, is that correct?

A That's correct.

Q Now, after you called back down to the police station, Officer, you found out that Mr. Shard had filed a complaint with the police that he had been robbed, is that correct?

A Later, yes.

Q Now, did you look at his police report?

A I didn't have it at the time.

Q Well, did you look at it later?

A Yes, I did.

Q And he made out a police report on the 21st. And [fol. 83] is that the police report there, Officer?

A Yes, that is.

Q Now, Officer, calling your attention here, you have number of offenders and we have a description—

MR. POMARO: Objection to this, your Honor. This is not this police officer's report.

THE COURT: Is that his police report?

THE WITNESS: No, your Honor.

THE COURT: Did you make this?

THE WITNESS: No, your Honor.

THE COURT: Sustained.

MR. BEAN: Q You had the two defendants in the room when the complaining witness came down. What type of room was this, Officer?

A It is an open room, something of a courtroom order.

Q Large as this?

A Not quite as large.

Q Were there tables or what?

A Well, there were several tables alongside the window, and some chairs, and also there were other tables around. It is the headquarters, all the areas headquarters.

[fol. 84] Q Were you sitting with both of the defendants at that time?

A Pardon?

Q Were you sitting with both of the defendants at that time?

A Yes, I was.

Q And then Mr. Shard came in?

A Yes.

Q And who else were you sitting with, Officer?

A I was sitting with my partner. We were the only two.

MR. BEAN: That's all I have, your Honor.

MR. CUSICK: No further questions.

THE COURT: You may step down.

(Witness excused.)

MR. CUSICK: May we be heard at side bar?

(Thereupon, a discussion was had between Court and counsel, outside the hearing of the jury and court reporter, after which the following proceedings were had within the presence and hearing of the jury:)

MR. CUSICK: The State at this time offers People's Exhibit 1, for identification, into evidence as People's [fol. 85] Exhibit 1.

THE COURT: All right. People's Exhibit 1, for identification, is admitted into evidence as People's Group Exhibit 1.

(Thereupon, People's Group Exhibit 1, marked for identification, was received in evidence as People's Group Exhibit 1.)

* * * *

[fol. 90]

RALPH R. BEAN,

called as a witness on behalf of the defense, having been first duly sworn, was examined and testified as follows:

DIRECT EXAMINATION

By Mr. Bean:

Q Would you state your name and address, please?
A Ralph Bean, 2100 West Warren.
Q Now, calling your attention to February 22—strike that.
Now, prior to the time you were arrested—strike that. Were you arrested on February 22nd?
A Yes, I was.
Q And in whose company were you arrested?
A In the company of Kirby Thomas.
Q Now, the police officers testified there were travelers checks on Mr. Kirby's presence at that time?
A That's right.
Q Do you know where Mr. Kirby got the travelers checks?
A Yes, I do.
Q And where was that?
A They were found.
Q And where were they found?
[fol. 91] A It was in the 2200 block, betwen Hoyne and Warren.
Q And how long was this before you were arrested?

A I would say about two hours or better.

Q And tell the ladies and gentlemen of the jury specifically where you found them?

A They were off the street in an alley.

Q Were they out in the middle of the alley or—

A No, it's kind of a gangway but it's not really a gangway.

Q Now, what happened after you were arrested?

A We were taken to the police station.

Q And what occurred there?

A Well, we were seated at a table and we were searched at the police station.

Q What happened after that?

A Well, while we were seated, Officer Rizzi, that I know right there, he was making a phone call to someone.

Q And who were you seated with?

A Kirby Thomas.

Q And was any other police officer besides Officer Rizzi there?

A Yes, it was Officer Panepinto there originally, and [fol. 92] there was two other officers that came.

Q Now, calling your attention specifically, did you see the complaining witness, Mr. Shard, arrive?

A Yes, I did.

Q And what, if anything, happened when he arrived?

A Well, when he came into the room—where we were sitting, we were facing an open door stairway, and when he came in there, he was just standing around, you know, looking just where to go.

Q What did you observe happen then?

A He was approached by someone I assumed to be a police officer.

Q What happened?

A And he brought him over to the table where we were.

Q All right, continue?

A And in the course of walking to the table, Mr. Shard, Willie Shard, as I know him, was saying something about "I don't know", or "I told you I can't identify", or something like that. I can't quote him exactly.

Q What happened after that?

A And one police officer says, "Well, these got to be the guys, they got your stuff," and he said—

[fol. 93] MR. CUSICK: Objection, your Honor, to this hearsay.

THE COURT: Sustained.

MR. CUSICK: I ask that the answer be stricken.

THE COURT: The answer will be stricken and the jury is instructed to disregard it.

MR. BEAN: Q What happened then?

A Well, after that we were taken to another room and another officer proceeded to inventory some of the things which were taken off of us.

Q All right. Did you see Mr. Shard before that?

A No.

Q Did you see him on February 20th?

A No, I didn't.

Q Do you know where you were on February 20th about four-thirty?

A No, I don't know exactly. I have been trying to pinpoint my actions, but I can't say exactly where I were.

Q Did you ever take anything from Mr. Shard?

A No.

MR. BEAN: That's all I have.

[fol. 94] CROSS EXAMINATION

By Mr. Cusick:

Q Mr. Bean, you were arrested on February 20th?

A No, I wasn't.

Q February 22nd, I'm sorry?

A Yes, I was.

Q And on February 22nd, were you informed of the nature of the crime; robbery? Did the police tell you that you were wanted for robbery?

A No, he didn't.

Q Well, when on February 22nd, did you find out you were charged with robbery?

A After we were taken to the police station.

Q In the police station on February 22nd?
A Yes, after they brought someone in.
Q Now, when you were informed that you were charged with robbery, were you also informed when the robbery allegedly took place?
A No.
Q Did they tell you when it took place, if it took place three weeks ago or a year ago?
A I don't remember.
Q Well, at that time—I know you don't remember now—but at that time, on February 22nd, were you told you were wanted in a robbery that occurred on February [fol. 95] 20th, two days earlier?
A No.
Q You were your apprised of this?
A No, I wasn't told I was wanted in a robbery.
Q Therefore, you quite conveniently can't remember where you were on February 20th, is that right?
MR. BEAN: Objection, your Honor.
THE COURT: Sustained.
MR. CUSICK: Q Now, were you employed at all during the month of February, 1968?
A Yes, I was.
Q And what day of the week were you arrested on, if you recall?
A I don't know the exact date but I know it was—
Q Could it have been a Thursday?
A I don't know the exact date, but it was the 22nd, I think that was Washington's birthday.
Q Could that have been a Thursday, the day of the week?
A I don't know.
Q Well, were you employed that week anywhere?
A Yes, I was.
Q What was the nature of your employment?
[fol. 96] A Well, I was involved in what you call a work prject at St. Leonard's House.
Q And is this a full time job where you are there during the daytime hours?
A Yes, I am there during the daytime hours, and we have daily seminars during the afternoon.

Q Just answer yes or no. Now, on February 20th, that would have been a Tuesday and February 22nd would have been a Thursday, is that right?

A That's right.

Q Would you have been employed that Tuesday?

A Yes, I would have been.

Q Would did you work that Tuesday?

A I would have worked at St. Leonard's House.

Q And do you have any time card that you would sign?

A No.

Q Did you have any type of payroll records that showed you received any pay for working there?

A Yes.

Q Do you have it here in Court with you?

A No, I haven't.

Q Does your attorney have them?

A No, he hasn't.

[fol. 97] Q Did you know you were going to be tried this week?

A Yes, I did.

Q Now, about what kind of a salary did you earn there?

A Maximum of $25 a week.

Q Now, once again, though, you can't recall where you were at about four-thirty in the afternoon on Tuesday, February 20th?

A No, I can't.

Q Now, you lived at 2100 West Warren, which Warren is—actually, that's how far West Hoyne Avenue is, is that correct?

A No, Hoyne Avenue runs past Warren.

Q Well, is Hoyne Avenue approximately 2100 west?

A Yes.

Q And you heard the previous testimony that the robbery occurred between Madison and and Hoyne Boulevard, on Hoyne, is that right, you heard that testimony?

A I think so, I am not sure.

Q The robbery in this case took place about half a block from where you were working that day, is that correct?

[fol. 98] A Yes, if that's where it occurred.

Q You state that on the 22nd of February when you were arrested, you found some travelers checks?

A Yes.

Q And where did you find them, again?

A Where did I find them?

Q Yes.

A I found them up in an alley in a gangway.

Q Now, what were you doing in the alley or gangway?

A Well, I stepped off the street to take a drink of alcohol.

Q And how far up the alley were these checks?

A I would estimate roughly 20 feet, I can't be precise.

Q Now, does this alley run north or south or east or west?

A West.

Q East and west?

A East and west.

Q And when you stepped off the street to step in the alley, what street would you have been stepping off of?

A I would have—I don't know the name of the street. It's a block west of Hoyne.

[fol. 99] Q Would that be Leavitt Street?

A That's right.

Q And were you on the east side of the street or the west side?

A I was on the north side. I was on the north side of the street.

Q You were on Leavitt, is that right?

A No, I wasn't—yes, I was on Leavitt between Warren and Madison.

Q Leavitt runs north and south, is that right?

A That's correct.

Q So what side of the street were you on?

A On the west side of the street.

Q Now, who were you with when you stepped into the alley?

A Kirby Thomas.

Q And you stepped in there to have a drink?

A Yes.
Q Did you have some whiskey on your person?
A Yes, I did.
Q And you lived pretty close to there, is that right?
A I beg your pardon?
Q You lived about a block away from this alley, is that right?
[fol. 100] A Yes, I did.
Q You didn't go home to drink, is that right?
A No, I didn't.
Q Now, tell me about this alley. Is this an alley that is pretty clean, clean from trash, or describe it for us?
A It's fairly clean, it's not cluttered up.
Q How far into the alley did you walk to have the drink?
A I would say about twenty feet, something like that.
Q And where, exactly, in the alley were the checks?
A They was laying—they was strewn on the ground.
Q How many checks were there?
A There was three.
Q And who picked them up?
MR. BEAN: Objection, Judge, it has been testified to.
THE COURT: I'll let him answer.
MR. CUSICK: Q Who picked the checks up?
A I did.
Q And what else did you pick up besides the checks, if anything?
A Some identification.
[fol. 101] Q Who was the identification of?
A It said Willie Shard.
Q Were these items just scattered around the alley or in a nice, clean pile or how were they?
A No, they was strewn around.
Q This was at four-thirty in the afternoon?
A No, it wasn't at four-thirty in the afternoon.
Q When did you pick these up?
A This was about a quater after nine or so, in the morning.

Q In the morning. Now, were these checks soiled in any way?

A They were folded up.

Q They were folded?

A When they were originally found, yes.

Q In half?

A And after laying there I wouldn't think they were clean.

Q I see. And you were arrested at eleven o'clock, is that right?

A At about eleven o'clock.

Q What did you do after you stepped in the alley and picked the checks up?

A Well, we examined them and came out of the [fol. 102] alley.

Q And then what did you do?

A And we came around the corner and proceeded west on Madison Street.

Q When were you arrested?

A When was I arrested?

Q Yes.

A I was arrested on February 22nd.

Q Now, you picked the checks up the same day, you allege, is that correct?

A Yes.

Q How much time after you picked up the checks were you arrested?

A I would say about an hour and a half or forty minutes, or so.

Q You started walking west on Madison Street from Leavitt, that is 2200 block on Madison, is that right?

A Yes.

Q And where did you go?

A We didn't get anyplace. We were walking when we was stopped by the police.

Q I see. What was the nature of your employment at the St. Leonard's House?

[fol. 103] A It's what is called a work project.

Q What did you do with the work project?

A Various jobs.

Q Such as?

A Cleaning, keeping the place clean.
Q Did you ever know Mr. Willie Shard from any other time or place prior to this occasion?
A No.
MR. CUSICK: No further questions.
MR. BEAN: I have nothing further, Judge.
THE COURT: You may step down.

(Witness excused.)

* * * *

[fol. 109] HAROLD MARSICEK,

called as a witness on behalf of the People, in rebuttal, having been first duly sworn, was examined and testified as follows:

DIRECT EXAMINATION

By Mr. Pomaro:

Q State your name, please?
A Harold Marsicek.
Q Spell your last name, please?
A M-a-r-s-i-c-e-k.
Q What is your business or occupation?
A I am a detective, 4th Area, Robbery Section.
Q And by whom are you employed?
A City of Chicago.
Q And for how long have you been a police officer?
A I have been a police officer 26 years.
Q And how long have you been a detective?
A 19 years.
Q And what is your current assignment, Detective?
A Fourth Area, Robbery Section.
Q Were you so assigned on February 22, 1968?
A I was.
Q Calling your attention to that date, did you have occasion to see one Willie Shard?
[fol. 110] A I did.
Q And did you have occasion to accompany Mr. Shard to the Area 4, Robbery headquarters?
A I did.

Q And would you tell, please, what happened upon arrival at the Area 4 headquarters?

A The 4th Area Robbery Section is located on the second floor at that location, 947 West Maxwell Street. And as we walked to the top of the stairs, we were about to enter the squadroom, which is a large room. Seated across the room were two men, along with two detectives, at a table.

Q Those two men, do you see them in court today?

A I do.

MR. BEAN: Excuse me, your Honor, I would like to make an objection.

THE COURT: This is rebuttal. You may proceed.

MR. POMARO: Detective, do you see those two men in court today?

A I do. The two defendants, Kirby Thomas and Ralph Bean.

MR. POMARO: Indicating for the record the defendants.

Q Would you tell us, please, what happened when [fol. 111] Mr. Shard entered the room?

A As we walked through this first door, entering this room, Mr. Shard, he pointed across the room and he said, "Those are the two men that robbed me."

Q Had you said anything to Mr. Shard concerning these two men prior to his pointing them out?

A No, I did not.

Q Had you indicated in any way that these were the two men involved?

A No, we had not seen them before.

Q Did you know who the two men were prior to this?

A No, I didn't.

Q Is that the first time you saw the two defendants?

A That's correct.

Q And Willie Shard positively identified these two men as the ones who robbed him on February 20, 1968, correct?

A That's correct.

MR. POMARO: Your witness, counsel.

CROSS EXAMINATION

By Mr. Bean:

Q You accompanied Mr. Shard downtown, Officer? You say you accompanied him down to the police sta-
[fol. 112] tion?

A We picked him up at his place of employment, with my partner, William O'Connor, and myself.

Q And you took him down to the Maxwell Street Station?

A That's correct.

Q And where, specifically, did you take him at the Maxwell Street Station?

A We received a radiogram approximately three-quarters of an hour prior to us bringing him in there, that we should call our office. And at that time we received instructions to go to 828 North Wells Street, and pick up Mr. Shard.

Q What happened after you picked him up, Officer? Where did you take him in the police station?

A We took him to our 4th Area Robbery Section.

Q And is that a room or what?

A We got into the squadroom on the second floor, that's our office, our office is adjoining this room.

Q And the two defendants were in there, at that time, is that right?

A They were sitting in the squadroom.

Q Who were they with at that time?

[fol. 113] A They were sitting at a table with Detective Panepinto and Detective Rizzi.

Q And did you accompany Mr. Shard over to that table?

A I did.

Q Was anyone else sitting at the table, Officer, besides the people you named?

A The two detectives.

Q And the two defendants. Anything else?

A And the two defendants.

MR. BEAN: That's all I have of the officer.

MR. POMARO: No redirect, you may step down.

THE COURT: Step down.

(Witness excused.)

* * * *

OPINION FILED BY THE APPELLATE COURT OF ILLINOIS, FIRST DISTRICT, ON MARCH 10, 1970

PEOPLE OF THE STATE OF ILLINOIS, PLAINTIFF-APPELLEE

vs.

THOMAS KIRBY (Otherwise Called KIRBY THOMAS) (Impleaded), DEFENDANT-APPELLANT

APPEAL FROM THE CIRCUIT COURT OF COOK COUNTY

Hon. L. Sheldon Brown, Presiding

MR. JUSTICE LYONS DELIVERED THE OPINION OF THE COURT.

The defendant was convicted, following a jury trial, of the offense of robbery in violation of Illinois Revised Statutes, Chapter 38, section 18-1 (1967). Judgment was entered on the verdict and defendant sentenced to a term of not less than five nor more than twelve years in the Illinois State Penitentiary. In this appeal the defendant contends that the trial court erred in denying his motions to suppress physical evidence and identification testimony.

At the hearing on the motion to suppress physical evidence, Kirby and his co-defendant testified that they were arrested in the vicinity of 2400 West Madison Street in the City of Chicago, Illinois, on February 22, 1968. The defendant further testified that after police stopped him they searched his person, recovering his personal identification and certain traveler's checks bearing the name Willie Shard. The officers did not inform him that he resembled a man wanted by the police for confidence game, at the time of his arrest.

The arresting officers testified for the State. Officer Baggio Panepinto testified that he and his partner were riding in a squad car in the vicinity of 2200 West Madison when he noticed that the defendant Kirby, then walking, resembled one Alphonso Hampton, who was wanted for con game according to a police department bulletin which bore Hampton's picture and description and which was in the squad car.

Officer Panepinto further testified that the defendant and his companion were stopped and asked to identify themselves. While Kirby was looking for identification in his wallet, he, Panepinto, noticed certain traveler's checks bearing the name "Willie" in the wallet. He asked the defendant who they belonged to and he responded that they were play money. The officer then asked to see the checks. Kirby handed them to Panepinto who was then able to observe the complete name which the checks bore, "Willie Shard." When asked who Willie Shard was, Kirby stated that he won the checks in a crap game. On cross-examination the officer testified that Alphonso Hampton was 5'2" in height and defendant Kirby 5'5" in height. At the time defendant was stopped, the officer did not know that Willie Shard had been the victim of a robbery.

Officer James Rizzi's testimony, insofar as it was relevant to the present defendant, corroborated that of Officer Panepinto.

At the close of this testimony the trial court denied defendant's motion to suppress the traveler's checks and a Social Security Card later taken from defendant and also bearing the name "Willie Shard."

At the hearing on defendant's motion to suppress the identification testimony of the victim, Kirby and his co-defendant each testified that he was not advised of his right to have counsel present prior to and at the time of his identification. The State did not cross examine, nor did they present any evidence. Defendant's motion was denied.

The testimony at trial with respect to Shard's identification of the defendant at the police station was as follows:

WILLIE SHARD

On February 22, 1968, two days after he was robbed and one day after he reported the robbery to the police, he was requested, by phone, to come to the police station. Two police officers picked him up and brought him to the station. The officers who picked him up asked

if he was robbed and if he could identify the offenders and he responded in the affirmative.

When he walked into the police station the defendant and co-defendant were seated at a desk. A police officer asked him if he recognized his assailants and he identified the defendant, along with his co-defendant.

OFFICER JAMES RIZZI

When Mr. Shard arrived at the station, two hours after the defendant had been brought in, the defendants were seated in a large room. Shard walked into the room and stated that Kirby and his co-defendant were the men who had robbed him. The men identified were then asked to stand and Shard reaffirmed the identification. To the best of his knowledge, Mr. Shard was not prompted or coached prior to entering the room.

RALPH BEAN (co-defendant)

He and defendant Kirby were seated at a table with police officers when Mr. Shard arrived. He walked in and stood by the door until approached by another man, who the witness assumed was a police officer. The officer brought Mr. Shard toward the table where he and Kirby were seated. As they approached the table Shard said something to the effect that he did not know or could not identify them, and one of the police officers said that the witness and Kirby must be the ones since they had Shard's property.

This last statement was objected to as hearsay and the objection was sustained.

Defendant first contends that the trial court erred in denying his motion to suppress physical evidence. He argues that his arrest was without probable cause and therefore the physical evidence taken from his person should have been suppressed as the product of an unlawful arrest. While the defendant properly states the proposition of law, the testimony of Officer Panepinto, which the trial court was at liberty to, and apparently did believe, clearly presents a factual situation in which

the rule is not applicable. The officer testified that he noticed the traveler's checks in defendant's wallet while defendant was looking for identification. Further, the officer testified that defendant surrendered the checks to him upon request. Clearly the checks were not recovered by the officer as the result of a search. Rather, their discovery falls within the purview of the plain view doctrine of *People* v. *Davis*, 33 Ill. 2d 134, 210 N.E. 2d 530 (1965).

Defendant is also correct in his assertion that the mere possession of the goods of another is not sufficient to establish probable cause for arrest. Here, however, an additional element is present. Defendant's possession, coupled with his having given conflicting explanations of that possession, is sufficent to establish probable cause for arrest. The Social Security Card taken from defendant was not recovered until after probable cause for the arrest existed.

This determination, that defendant's arrest was based upon probable cause, is also determinative of his second contention, that the identification testimony should have been suppressed as the product of an unlawful arrest.

Defendant next contends that the trial court erred in denying his motion to suppress identification testimony in that he was not advised of his right to have counsel present at the showup, relying on *U.S.* v. *Wade*, 388 U.S. 218, 87 S.Ct. 1926 (1967) and *Gilbert* v. *California*, 388 U.S. 263, 87 S.Ct. 1951 (1967). In *Wade*, the defendant was placed in a police lineup subsequent to his having been indicted and prior to trial without notice to, and in the absence of, his court appointed counsel. In finding the procedure improper the court held that a post-indictment lineup was a critical stage of the proceedings against the accused and therefore the Sixth Amendment guarantee of assistance of counsel applied thereto.

In *Gilbert*, the accused was also placed in a post-indictment lineup without notice to defense counsel. All the witnesses who identified Gilbert at trial testified that they had also identified him at the lineup. The court, following *Wade*, held: (1) the lineup was held in viola-

tion of Gilbert's Sixth Amendment rights and therefore testimony with respect thereto was not admissible against him; and (2) it was error to admit into evidence the in-court identification of the accused without first determining that such identification was not tainted by the illegal lineup, but was of independent origin.

People v. *Palmer*, 41 Ill. 2d 571, 244 N.E. 2d 173 (1969) determines the issue adversely to defendant. There the Supreme Court, in interpreting the language of *Wade*, *Gilbert*, and the subsequent case of *Simmons* v. *U.S.*, 390 U.S. 377, 88 S.Ct. 967 (1968), held those decisions to apply only to post-indictment confrontations. Here the record clearly shows the showup to have taken place prior to defendant's indictment.

Defendant's third contention in support of his allegation that testimony regarding his showup identification should have been suppressed constitutes a direct attack upon the use of a showup as an identification procedure. He argues that the showup is inherently suggestive in nature and therefore where no compelling reason for securing an immediate identification such as was found to exist in *Stovall* v. *Denno*, 388 U.S. 293, 87 S.Ct. 1967 (1967) exists, a lineup should always be held. We are aware of no such requirement. On the contrary, the Supreme Court has noted that while the showup has been observed to involve a degree of suggestion, not every exhibition of an accused by means of a showup, where a lineup is possible, constitutes a denial of due process. *People* v. *Blumenshine*, 42 Ill. 2d 508, 250 N.E. 2d 152 (1969).

The defendant also contends that the circumstances surrounding his identification were so suggestive as to deny him due process of law. In support of this argument defendant again points out that a showup, rather than a lineup, procedure was used, which allowed the identification witness to view him while he was seated between two police officers. He further calls attention to the fact that Mr. Shard knew the purpose for his trip to the police station, to make an identification.

There is no doubt that an identification procedure may be so suggestive in a given case as to deny the accused

due process of law. But when called upon to determine whether due process has been denied a particular individual, courts must consider the totality of the circumstances surrounding the identification, not merely those which tend to support defendant's theory. *Stovall* v. *Denno*, 388 U.S. 293, 87 S.Ct. 1967 (1967). Here the victim was attacked during the daylight hours and had an excellent opportunity, according to his own testimony, to observe the assailants before, during, and after the assault. In addition, he was positive in his identification of defendant as one of the offenders. In this same regard, Officer Panepinto testified that Mr. Shard identified the defendant immediately upon sight. In view of the totality of the circumstances surrounding the identification, we do not believe that defendant was denied due process of law.

Finally, the defendant has contended that he was denied effective assistance of counsel at the hearing on his motion to suppress the identification testimony. Defendant points out that although the written motion to suppress submitted to the court contained two points, the first relating to Sixth Amendment rights and the second to due process considerations, defense counsel elicited testimony only regarding the first, right to counsel. This allegation of denial of effective assistance of counsel is directed only to the hearing on motion to suppress identification testimony. It appears to be an effort by defendant to save, for purposes of appeal, a point not properly presented to the trial court. We deem this contention to be moot in view of our having considered defendant's due process argument.

Having found each of the contentions of defendant to be without merit, we affirm the judgment of the Circuit Court.

JUDGMENT AFFIRMED.

McCORMICK, P.J., and BURKE, J., concur.

SUPREME COURT OF THE UNITED STATES

No. 6401, October Term, 1970

THOMAS KIRBY, ETC., PETITIONER

v.

ILLINOIS

On petition for writ of Certiorari to the Appellate Court of the State of Illinois, First District.

On consideration of the motion for leave to proceed herein *in forma pauperis* and of the petition for writ of certiorari, it is ordered by this Court that the motion to proceed *in forma pauperis* be, and the same is hereby, granted; and that the petition for writ of certiorari be, and the same is hereby, granted limited to Question 2 presented by the petition which reads as follows:

"(2) Whether due process requires that an accused be advised of his right to counsel prior to a pre-indictment showup at a police station several hours after his arrest and forty-eight hours after the alleged crime occurred."

May 24, 1971

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70-5061

No. 6401

In the Supreme Court of the United States

THOMAS KIRBY,

Petitioner,

vs.

PEOPLE OF THE STATE OF ILLINOIS,

Respondent.

PETITIONER'S BRIEF

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INDEX

CASES CITED

OTHER AUTHORITIES CITED

UNITED STATES CONSTITUTION CITED

STATUTES CITED

In the
Supreme Court of the United States

No. 6401

THOMAS KIRBY,

Petitioner,

vs.

PEOPLE OF THE STATE OF ILLINOIS,

Respondent.

PETITIONER'S BRIEF

Opinion Below

The opinion of the Appellate Court of Illinois is reported at 121 Ill.App.2d 323, 257 N.E.2d 589 (1970).

Jurisdiction

The opinion and judgment of the Appellate Court of Illinois were entered on March 10, 1970. On October 5, 1970, the Supreme Court of Illinois denied leave to appeal. Petitioner filed his petition for certiorari on December 31, 1970, and this Court granted certiorari on May 24, 1971. This Court's jurisdiction is invoked under 28 U.S.C. §1257(3).

Question Presented

Whether due process requires that an accused be advised of his right to counsel prior to a pre-indictment identification which occurred at a police station several hours after his arrest and forty-eight hours after the alleged crime occurred.

Constitutional and Statutory Provisions Involved

The Sixth Amendment to the United States Constitution provides in pertinent part:

> "In all criminal prosecutions, the accused shall enjoy the right . . . to have the Assistance of Counsel for his defence."

The Fourteenth Amendment to the United States Constitution provides in pertinent part:

> ". . . nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

Chapter 38, §103-4, Ill.Rev.Stat. 1969, provides in pertinent part:

> "Any person committed, imprisoned or restrained of his liberty for any cause whatever and whether or not such person is charged with an offense shall, except in cases of imminent danger of escape, be allowed to consult with any licensed attorney at law of this State whom such person may desire to see or consult, alone and in private at the place of custody, as many times and for such period each time as is reasonable. . . ."

STATEMENT OF FACTS

The Robbery of Willie Shard

On February 20, 1968, at 4:30 P.M., Willie Shard was walking along a street in Chicago, Illinois. (A. 18). He turned and noticed that two men were following fifteen feet behind him, but paid no attention to them. (A. 18, 26). As he turned to enter a restaurant, a man grabbed him from behind, while another man took from his pockets $140 in traveler's checks, about $30 or $35 in cash, his wallet, and all his identification cards. (A. 19, 26). The men then went one way and Shard went another. (A. 19). Shard returned to his apartment, but did not call the police. (A. 20). The next day he filed a complaint and gave the police a general description of the height, weight and complexion of the two men. (A. 20, 23).

Petitioner's Arrest

Two days after the [illegible]ry, at approximately 9:00 A.M., petitioner and Ralph Bean stepped into an alleyway to take a drink of alcohol. (A. 43). Bean testified that they found traveler's checks alo[illegible] various identification papers strewn upon the gro[illegible] 44).

Later that morning, at about [illegible]00 A.M., two Chicago police officers, Biaggio Panepinto [illegible] James Rizzi, were cruising in an unmarked squad car when they noticed petitioner and Bean. (A. 29, 33). Petitioner and Bean were doing nothing unusual, but Officer Panepinto recognized his partner that petitioner resembled a man [illegible] for

perpetrating a con game.* The officers then stopped the two men. (A. 11).

Officer Panepinto asked petitioner for identification but did not tell him why he had been stopped. (A. 7, 9, 12). When petitioner opened his wallet to produce his identification, the officer noticed traveler's checks bearing the name "Willie Shard." (A. 12, 34). When he asked petitioner to explain the checks, petitioner responded that they were "play money" and that he had won them in a crap game. (A. 12). Petitioner's companion, Ralph Bean, was also searched, and identification papers belonging to Shard were found on him. (A. 15). Petitioner and Bean were arrested and taken to the police station. (A. 6, 30).

The Showup Identification

After arriving at police headquarters, petitioner and Bean were interrogated. (A. 36). It is uncontroverted that they were not then advised of their right to counsel. (A. 16, 17).

On checking records, the officers first discovered that Willie Shard had been robbed two days earlier. (A. 31). The officers telephoned Shard and told him to report to the station to view two suspects. (A. 21, 24, 27). An officer picked up Shard and, after discussing with Shard the men who robbed him, drove him to the station. (A. 24). When Shard arrived at the station, several hours after petition-

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* The officers had a bulletin in the squad car which described the suspect as a male Negro, approximately 35 years of age, 5'2", 125 lbs., slender build, medium dark complexion. (A. 12). Petitioner was described by Officer Panepinto as approximately 5'5" in height. (A.13). It is undisputed that petitioner was not the man described in the bulletin.

er's arrest, petitioner and Bean, who are black, were seated at a table in a large squad room between Officers Rizzi and Panepinto. (A. 31, 37). The officers asked Shard if the two men were the robbers. (A. 24). Shard pointed to petitioner and Bean. (A. 24). No lineup was ever held, and the only means of identification was that just described.

During the several hours they were held at the police station, neither petitioner nor Bean was advised of his right to counsel. (A. 16, 17, 31). It was not until their arraignment on April 16, 1968, more than seven weeks after their arrest, and eight days after an indictment was returned against them, that the Public Defender was appointed to represent the two men. (A. 1).

The In-Court Identification

Prior to trial, petitioner and Bean moved to suppress the items recovered from the search of their persons and to suppress Shard's identification testimony. (A. 1, 4). Bean's motion to suppress the physical fruits of his search was granted. All other motions were denied.

Petitioner and Bean were tried together on August 1, 1968, and Willie Shard and the two arresting officers were the State's only witnesses. Shard testified that two men were walking about fifteen feet behind him just before the robbery, but that he had not noticed them. (A. 18, 26). Concerning the robbery itself, he testified that one of the men grabbed him from behind and another man went through his pockets. (A. 19, 26). He did not indicate which man grabbed him. He further testified that he was summoned to the police station on February 22 to identify petitioner and Bean. (A. 21, 27). He made no in-court identification independent of the station house confrontation. His testimony was only that the two men in

court were the same two men he identified at the police station. (A. 21).

Petitioner and Bean were both found guilty of the crime of robbery. (A. 2). Petitioner was sentenced to the Illinois State Penitentiary for a term of not less than five nor more than twelve years.* (A. 2).

SUMMARY OF ARGUMENT

Petitioner should have been advised of his right to counsel prior to the pre-indictment identification by Shard at the police station. The arrest occurred two days after the alleged crime had been committed. The "showup" occurred several hours after petitioner's arrest. There was no compelling reason which would have prevented the police from informing petitioner of his right to counsel so that a proper lineup could have been conducted. In *United States* v. *Wade*, 388 U.S. 218 (1967) and *Gilbert* v. *California*, 388 U.S. 263 (1967), this Court held that an identification confrontation is a critical stage in the criminal process at which counsel should be present. While the narrow facts of those cases involved post-indictment lineups, the reasoning of this Court in these decisions applies equally to the confrontation in the case at bar.

Because he was not advised of his right to counsel, petitioner was unable to object to the prejudicial circumstances surrounding his identification. The witness was asked

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* Bean's appeal, which was considered by the Illinois Appellate Court, together with petitioner's, resulted in reversal. Citing *Davis* v. *Mississippi*, 394 U.S. 721 (1969), that court held that his identification resulted from the unlawful seizure of his person, and suppressed all subsequent identifications, including the in-court identification. *People* v. *Bean*, 121 Ill.App.2d 332, 257 N.E.2d 562 (1st Dist. 1970).

by the police to point out the two men who robbed him. (A. 24). At that point the suspects were seated at a table in a large squad room between two police officers. (A. 37). There is no evidence that the witness at the time of the crime had a chance to view each man individually. By being asked to identify the two suspects together as was done in this case, the police increased the possibility that an innocent man would be mistakenly identified. In addition to the value of having counsel present to object to the lack of a proper lineup, the presence of counsel would have facilitated effective cross-examination at trial on the many inconsistencies in the witness' testimony.

It cannot be argued under the facts of this case that the presence of counsel would have prejudicially delayed the confrontation. Furthermore, Illinois law guarantees an accused the right to consult with an attorney immediately after his arrest. This right is in no way dependent upon the formality of whether an indictment has been returned.

The admission at trial of evidence of the unlawful confrontation falls squarely within this Court's *per se* exclusionary rule announced in *Gilbert* v. *California*, 388 U.S. 263, 272-273 (1967).

ARGUMENT

I.

A PRE-INDICTMENT CONFRONTATION IS A CRITICAL STAGE IN THE CRIMINAL PROCESS AT WHICH COUNSEL SHOULD BE PRESENT.

The constitutional right to assistance of counsel guaranteed by the Sixth Amendment to the Constitution and made obligatory upon the States by the Fourteenth Amendment, *Gideon* v. *Wainwright,* 372 U.S. 335, 342 (1963), requires that an accused be allowed counsel at all "critical" stages in the criminal process. *Powell* v. *Alabama,* 287 U.S. 45, 57 (1932); *White* v. *Maryland,* 373 U.S. 59 (1963); *Escobedo* v. *Illinois,* 378 U.S. 478 (1964). In *United States* v. *Wade,* 388 U.S. 218 (1967), this Court held that an identification confrontation is a "critical stage" in the criminal process. This Court found that it was necessary to have counsel present at the identification confrontation, not only to objec to to irregularties, but also to assure that the accused is afforded his right to meaningful cross-examination of witnesses at trial. This reasoning applies equally to the case at bar.

Although the possibility for error in making an identification is great, identification testimony is probably the most persuasive and controlling of any evidence submitted to a jury.

> "A major factor contributing to the high incidence of miscarriage of justice from mistaken identification has been the degree of suggestion inherent in the manner in which the prosecution presents the suspect to witnesses for pretrial identification. A commentator has observed that '[t]he influence of improper suggestion upon identifying witnesses probably accounts

for more miscarriages of justice than any other single factor—perhaps it is responsible for more such errors than all other factors combined.' Wall, Eyewitness Identification in Criminal Cases 26." *United States* v. *Wade*, 388 U.S. at 228-229.

The prejudice which results if counsel is not present at the confrontation stage of the criminal process was summarized by the Court in *Wade* as follows:

> "[N]either witnesses nor lineup participants are apt to be alert for conditions prejudicial to the suspect. And if they were, it would likely be of scant benefit to the suspect since neither witnesses nor lineup participants are likely to be schooled in the detection of suggestive influences. Improper influences may go undetected by a suspect, guilty or not, who experiences the emotional tension which we might expect in one being confronted with potential accusers. Even when he does observe abuse, if he has a criminal record he may be reluctant to take the stand and open up the admission of prior convictions. Moreover, any protestations by the suspect of the fairness of the lineup made at trial are likely to be in vain; the jury's choice is between the accused's unsupported version and that of the police officers present. In short, the accused's inability effectively to reconstruct at trial any unfairness that occurred at the lineup may deprive him of his only opportunity meaningfully to attack the credibility of the witness' courtroom identification." *United States* v. *Wade*, 388 U.S. at 230-232.

In *Gilbert* v. *California*, 388 U.S. 263 (1967), this Court held that the rule announced in *Wade* was binding upon the states through the Fourteenth Amendment. The reasons requiring this Court to hold identification confrontations to be critical in *Gilbert* and *Wade* apply equally here.

This Court in *Wade* noted that the issue of guilt may for all practical purposes be determined at the identification confrontation:

> " '[I]t is a matter of common experience that, once a witness has picked out the accused at the line-up, he is not likely to go back on his word later on, so that in practice the issue of identity may (in the absence of other relevant evidence) for all practical purposes be determined there and then, before the trial.' " 388 U.S. at 229.

Petitioner's "guilt" was pre-determined at the pre-indictment held at the police station showup. The police made no attempt to conduct a lineup. For all practical purposes, the police told Shard that these were his assailants and would he please identify them. The failure to advise petitioner of his right to counsel prior to the showup undisputedly deprived him of a fair trial.

II.

THE ILLINOIS RULE THAT COUNSEL IS NOT REQUIRED AT PRE-INDICTMENT IDENTIFICATION CONFRONTATIONS IS INCONSISTENT WITH THE DECISIONS OF THIS COURT.

In deciding whether petitioner should have been advised of his right to counsel prior to the showup, the Illinois Appellate Court felt bound by the Illinois Supreme Court's decision in *People* v. *Palmer,* 41 Ill.2d 571, 244 N.E.2d 173 (1969). In *Palmer,* the Illinois Supreme Court held that the right to counsel was limited solely to post-indictment confrontations:

> "The confrontation here was immediately following the defendant's arrest and prior to his indictment and the appointment of counsel, and the decisions in

Wade and *Gilbert* are not binding, even though the pretrial confrontation occurred after the date of those decisions." 41 Ill.2d at 573.

In reaching this conclusion that counsel is not required at pre-indictment showups, the Illinois Supreme Court ignored the rationale of this Court's decisions in *Wade* and its progeny. The reference in *Wade* to a "post-indictment lineup," 388 U.S. at 237, was descriptive of the facts of that case and was unrelated to this Court's reasons for its conclusion that Wade's counsel should have been advised of the confrontation. Nothing in *Wade* supports the approach, taken by the Illinois Supreme Court in *Palmer*, of characterizing the happenstance of the timing of an indictment as the critical factor in denying persons their constitutional right to counsel.

This Court expressly held in *Wade*:

> ". . . the principal of *Powell* v. *Alabama* and succeeding cases requires that we scrutinize *any* pretrial confrontation of the accused to determine whether the presence of his counsel is necessary to preserve the defendant's basic right to a fair trial as affected by his right meaningfully to cross-examine the witnesses against him and to have effective assistance of counsel at the trial itself." (388 U.S. at 227) (Emphasis by the Court.)

The overwhelming majority of state and lower federal courts have rejected the pre-indictment—post-indictment dichotomy adopted by Illinois.* This dichotomy is un-

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* E.g.: *United States* v. *Greene*, 429 F.2d 193 (D.C. Cir. 1970); *Rivers* v. *United States*, 400 F.2d 935 (5th Cir. 1968); *United States* v. *Phillips*, 427 F.2d 1035 (9th Cir. 1970); *United States* v. *Clark*, 289 F.Supp. 610 (E.D. Pa. 1968); *Commonwealth* v. *Guillory*, 254 N.E.2d 427 (Mass. 1970); *People* v. *Fowler*, 1 Cal.3d 335, 82 Cal. Rptr. 363, 461 P.2d 643 (1969); *Palmer* v. *State*, 5

sound, both in its reasoning and practical application. In *Escobedo* v. *Illinois*, 378 U.S. 478 (1964), the State argued that Escobedo had no right to call his attorney, prior to an in-custody interrogation, since he was not formally indicted. This Court stated

> "It would exalt form over substance to make the right to counsel, under these circumstances, depend on whether at the time of the interrogation, the authorities had secured a formal indictment." 378 U.S. at 486.

The State may not argue that this case is distinguishable from *Escobedo* because here the confrontation was held in the investigatory stage rather than at the accusatory stage of proceedings. The police investigation of Shard's robbery was no longer a general inquiry into an unsolved crime. Rather, the investigation had focused upon particular suspects who were in police custody. Indeed, Shard was called to the station to identify his robbers. (A. 24). There is no question that petitioner was in a critical stage of the criminal process while in police custody and awaiting an identification showup.

In *Miranda* v. *Arizona*, 384 U.S. 436 (1966), this Court held that before an individual may be interrogated by the police he must clearly be informed that he has a right to

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Md. App. 691, 249 A.2d 482 (1969); *People* v. *Hutton*, 21 Mich. App. 312, 175 N.W.2d 860 (1970); *Commonwealth* v. *Whiting*, 439 Pa. 205, 266 A.2d 738 (1970), cert. den. 400 U.S. 919 (1970); *State* v. *Isaacs*, 24 Ohio App.2d 115, 265 N.E.2d 327 (1970); *In Re Holley*, 268 A.2d 723 (R.I. Sup.Ct. 1970). The only other states besides Illinois which have recognized the post-indictment distinction are: *State* v. *Fields*, 104 Ariz. 486, 455 P.2d 964 (1969); *Perkins* v. *State*, 228 S.2d 382 (Fla. 1969); *Buchanan* v. *Commonwealth*, 210 Va. 664, 173 S.E.2d 792 (1970); and *State* v. *Walters*, 457 S.W.2d 817 (Sup.Ct. Mo. Div. 2, 1970).

consult with an attorney and to have the attorney present with him. The right to counsel prior to an identification confrontation is no less important to the preservation of justice than is the right to counsel prior to interrogation.

The Illinois legislature has provided that an accused has a right to consult with an attorney immediately upon arrest. Chapter 38, §103-4, Ill.Rev.Stat. 1969. Petitioner was never advised of this right. Neither this Court nor the Illinois legislature has predicated an accused's right to counsel upon whether an indictment has been returned. Under the reasoning of the Illinois Supreme Court, even though counsel may have been retained or appointed, unless a formal indictment has been returned, a defendant has no right to counsel at an identification confrontation.

The rule announced by the Illinois Supreme Court in *Palmer* provides incentive to the police to circumvent *Wade* by holding all identification confrontations prior to the accused's indictment. In fact, in cases where the only evidence against an accused is a witness' identification, it is probable that a pre-indictment confrontation may be more crucial than one held after witnesses have appeared before the Grand Jury and an indictment returned. In any event, the possibilities of prejudicial suggestion, of misidentification and of depriving an accused effective cross-examination at trial are critical at the pre-indictment stage.

No reason can be advanced for denying petitioner his right to counsel. This case involves no immediate on-the-scene confrontation—petitioner had been taken into custody and imprisoned in the police station for several

hours before the witness arrived to identify him.* During this long period of time, the police easily could have advised petitioner of his rights and secured counsel for him, without prejudicially delaying the confrontation. See *United States* v *Wade*, 388 U.S. at 237.

III.

THE PRESENCE OF COUNSEL AT THE IDENTIFICATION CONFRONTATION WAS CRUCIAL TO PETITIONER'S DEFENSE.

Petitioner's identification was patently arranged by the police. The police summoned Shard to the station to identify two suspects. (A. 27). A police officer picked up Shard, questioned him about his assailants, and then drove him to the station. (A. 24). When he entered the squad room, Shard saw petitioner and Bean seated at a desk next to the two arresting officers. (A. 24, 37).

> "Q. And did the police officers say anything to you?
> A. They asked me to point them out and I pointed them two guys out.
> Q. They asked you if these were the ones?
> A. Right.

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* Some courts have held that the requirements of *Wade* are excused in an immediate on-the-scene confrontation. E.g.: *Russell* v. *United States*, 408 F.2d 1280 (D.C. Cir. 1969), cert. den. 395 U.S. 928 (1970). Where the accused is found at the scene of the crime immediately after it occurred, the circumstantial character and immediacy of the encounter mitigate against the suggestiveness inherent in an encounter, as in the case at bar, specifically staged by the police at a later time.

Q. How many other people were sitting there?
A. I didn't pay much attention.
Q. They asked you if these two, Kirby and Bean were the ones?
A. Correct, yes." (A. 24-25).

This Court noted in *Wade* that an identification confrontation is particularly suggestive when "the witness is told by the police that they have caught the culprit after which the defendant is brought before the witness alone or is viewed in jail" or when "the suspect is pointed out before or during a lineup." 388 U.S. at 233.

In *Foster* v. *California,* 394 U.S. 440, 443 (1969), this Court found it highly suggestive that the suspect was exhibited to a witness under circumstances where he "stood out" and where the police repeatedly stated in effect, "*This* is the man."

Shard was asked to point out petitioner and Bean collectively as the two black men were seated together at a table with Officers Rizzi and Panepinto. (A. 24, 37). Under these facts, where the mode of identification was by means of a showup rather than a line-up, the presence of counsel was particularly necessary to preserve petitioner's rights. A showup has been described as "the most grossly suggestive identification procedure now or ever used by the police." Wall, Eye-Witness Identification in Criminal Cases, 28 (1965). Had counsel been present at the confrontation, he could have requested that the men be exhibited to the witness in an identification parade where the witness would have been required to identify each man individually.*

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* In *Stovall* v. *Denno,* 388 U.S. 293, 302 (1967), this Court recognized that the practice of showing suspects singly to persons for the purpose of identification, and not as part of a line-up, has been widely condemned. However, the only witness who could

Shard's in-court identification of petitioner was:

> "Q. [State's Attorney] When you went to the police station [on February 22, 1968] did you see the two defendants?
> A. [Shard] Yes, I did.
> Q. Do you see them in court today?
> A. Yes, sir.
> Q. Point them out, please.
> A. Yes, that one there and the other one. [Indicating]
> Mr. Pomaro: Indicating for the record the defendants Bean and Kirby.
> Q. And you positively identified them at the police station, is that correct?
> A. Yes." (A. 21)

This Court in *Gilbert* v. *California,* 388 U.S. 263 (1967), held that testimony by a witness at trial of the illegal identification confrontation is inadmissible *per se*:

> "Only a *per se* exclusionary rule as to such testimony can be an effective sanction to assure that law enforcement authorities will respect the accused's constitutional right to the presence of his counsel at the critical lineup." 388 U.S. at 272-273.

Constitutional error was committed when petitioner was exhibited in a showup without being advised of his right to counsel, and again when Willie Shard testified at trial to the illegal showup. These errors deprived petitioner of a fair trial.

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identify Stovall was dying in the hospital and the Court held that the showing of Stovall alone to the dying woman was justified by compelling circumstances. In *Biggers* v. *Tennessee,* 390 U.S. 404 (1968), an equally divided court affirmed *per curiam* the conviction of a 16 year old youth who was exhibited singly to a witness at the police station. Whether or not a line-up is constitutionally required in the absence of compelling circumstances, it is clear that such suggestiveness as existed in the case at bar could have been eliminated if petitioner had been advised of his right to counsel.

CONCLUSION

This Court cannot, consistent with *Wade*, hold that counsel is required only at post-indictment identification confrontations. The formality of securing an indictment has no relationship to the requirement that counsel be present during police station identifications. Where the confrontation occurs two days after the crime and several hours after the accused has been taken into custody, and where no circumstances are shown that the presence of counsel would have prejudicially delayed the confrontation, the presence of counsel is constitutionally required. Were this Court to hold otherwise, it would effectively overrule *Wade*.

Petitioner respectfully prays that the decision of the Appellate Court of Illinois be reversed and this cause remanded with instructions ordering petitioner's release or that he be afforded a new trial at which all identification testimony is excluded.

Respectfully submitted,

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August 9, 1971

IN THE

Supreme Court of the United States

No. [redacted] 70-5061

THOMAS KIRBY,

Petitioner,

vs.

PEOPLE OF THE STATE OF ILLINOIS,

Respondent,

(On Writ Of Certiorari To The Appellate Court Of Illinois, First District)

BRIEF FOR RESPONDENT

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CONSTITUTION

MISCELLANEOUS

IN THE

Supreme Court of the United States

No. 6401

THOMAS KIRBY,

Petitioner,

VS.

PEOPLE OF THE STATE OF ILLINOIS,

Respondent,

(On Writ Of Certiorari To The Appellate Court Of Illinois, First District)

BRIEF FOR RESPONDENT

QUESTIONS PRESENTED

Whether the right to counsel at eyewitness confrontations is applicable where the confrontation occurred during an investigatory stage of the case and prior to indictment, preliminary hearing and the retention or appointment of counsel.

Whether the decisions of *United States* v. *Wade* and *Gilbert* v. *California* should be overruled to the extent that they hold that the right to counsel attaches to certain eyewitness indentification procedures.

STATEMENT OF FACTS

Thomas Kirby and Ralph Bean were indicted for the offense of robbery by a Cook County, Illinois Grand Jury. They were jointly tried by a jury and found guilty. Kirby was sentenced to the Illinois State Penitentiary for a term of not less than five nor more than twelve years. On appeal the appellate court affirmed, and thereafter the Supreme Court of Illinois denied Kirby's petition for leave to appeal. This Court granted a writ of certiorari on May 24, 1971 (A. 1-3).

Prior to trial, the two defendants filed motions to suppress physical evidence and motions to suppress identification testimony of a witness (A. 1). The motions to suppress identification testimony alleged that the identification was induced by the action of the police and that the defendant was not advised of his right to have counsel present.

A pre-trial evidentiary hearing was conducted by the court. Kirby's co-defendant, Ralph Bean, testified with regard to the motion to suppress physical evidence that on February 22, 1968, he and Kirby were stopped by two police officers as they were walking in the area of 2200 West Madison Street. They asked him for some identification, which he gave them, and they returned it to him. At the time the officers did not show him an arrest warrant. After the officers questioned Kirby, they told the two of them to get into their police car. They also took his identification from his pocket. (A. 5-6) The identification did not have Bean's name on it; it bore the name of Willie Shard.

As to the motion to suppress identification teestimony, Bean testified that the police officers did not inform him

that he had a right to have an attorney present prior to being identified.

During the hearing on the motion to suppress physical evidence, Kirby testified that they were stopped by the police in the area of 2200 West Madison Street on February 22, 1968, and asked to identify themselves. The police neither told them that they had an arrest warwarant nor said they had seen them commit a crime. After they were stopped, they were searched by the police. (A. 8)

Kirby further testified during the identification phase of the hearing that after he was placed under arrest he was not advised that he had a right to have an attorney present prior to being identified. (A. 17)

The two arresting officers testified for the prosecution during the hearing on the motion to suppress physical evidence. The substance of their testimony was that while they were riding in their squad car, Officer James Rizzi remarked to his partner, Biaggio Panepinto, that one of the two defendants looked like a wanted suspect whose photo was printed in one of their police bulletins. They made a "U" turn, went back and stopped the two men. They inquired as to their identifications, and both men produced identification bearing the name Willie Shard. As Kirby was looking for his identification, Officer Panepinto observed traveler's checks bearing the name Willie Shard. At first Kirby said these were play money, then he said that he won the checks in a crap game. After asking for additional identification, the officer noticed a social security card with the name Willie Shard also in Kirby's possession. The other officer discovered a Blue Cross and Blue Shield membership card with the name Willie Shard, a receipt from a Greyhound

bus ticket, a prescription card from a drug store and a duplicate social security card with the name Willie Shard in the possession of Bean. The two men were then placed under arrest and transported to the police station. (A. 9-16)

The prosecution offered no further evidence during the identification phase of the hearing. Upon the conclusion of the evidence, the judge granted the motion to suppress the physical evidence as to the items taken from the defendant Bean but denied the other motions to suppress.

During the trial on the merits, Willie Shard testified that on February 20, 1968, at about 4:30 in the afternoon, he was walking on Hoyne Street between Warren and Madison. He was coming from a Greyhound Bus Station, having returned from a trip to New Orleans. (A. 18, 22). As he was walking, he looked back and saw two men coming down the street — they were about fifteen feet away. (A. 18) At the time it was light out and he saw them well. (A. 19)

As he was about to step into a restaurant, one of the men ran up and grabbed him around the neck. Both men reached into his pockets and took everything he had including $140 in traveler's checks, about thirty dollars in cash, his wallet and his identification cards. (A. 19) The two men then fled in the direction of Madison Street. Shard said that he observed the men before, during and after the robbery. (A. 27-8)

The following day he went to a police station and made a report of the robbery. He gave the police physical descriptions of the two men. (A. 20, 21, 23)

On February 22, 1968, he was taken by two police officers to the Maxwell Street Police Station. When they picked him up, they asked if he had been robbed—he said yes—and if he could make an identification—he again said yes. After they arived at the station, he saw the two defendants sitting at a desk and he pointed them out. (A. 24)

Shard identified the defendants in the courtroom and also the property that was taken from Kirby at the time of the arrest.

The arresting officers in addition to testifying as to those events recounted during the hearing on the motion to suppress, testified that after transporting Shard to the station, they learned that there was a complaint that checks had been taken during a robbery of one Willie Shard. The two arrestees were detained in the squad room of the station house. About two hours later, Shard entered and said, "Those are the two men that robbed me." They did not prompt or coach him. (A. 31)

Ralph Bean, the co-defendant, testified that he and Kirby found the checks and identification in an alley in the vicinity of where they were arrested about two hours earlier. They had stepped into the alley to take a drink of whiskey. (A. 38, 39, 43, 44)

After they were arrested they were taken to the police station. Later Shard came to the station. Bean saw him standing by the doorway looking around. Someone brought Shard over to the table where they were sitting. He heard Shard say, "I don't know," or, "I told you I can't identify," or, "something like that." (A. 89)

Bean said that he never saw Shard before and that he didn't take anything from him.

In rebuttal Officer Harold Marsicek testified that he and his partner picked up Shard on February 22, 1968, and drove him to the police station. As they entered the squadroom, Shard pointed across the room at Kirby and Bean and said, "Those are the two men that robbed me." (A. 46, 47). Prior to this they had said nothing to Shard.

SUMMARY OF ARGUMENT

The courts have generally refused to hold that the right to counsel applies to all eyewitness confrontations, holding that confrontations occurring shortly after the crime, accidential confrontations, confrontations involving suspects not in custody and photographic confrontations are all exempt from the right to counsel. Under the facts of this case, the right to counsel would have to be extended to cover all cases of police arranged confrontations involving the corporeal presence of the suspect which confrontations did not occur within minutes of the crime before the right to counsel would apply herein. The petitioner here was confronted prior to formal filing of charges and preliminary hearing as well as prior to indictment. Petitioner had neither retained nor been appointed counsel when he was confronted, and the confrontation occurred within 48 hours of the crime and a couple of hours after arrest. It has also been held that confrontations which are investigatory and not accusatory do not give rise to a right to counsel. In this case, the confrontation was investigatory.

The lower courts have split on the issue of applying right to counsel to pre-indictment lineups. However, the express language of this Court's opinions makes it clear that this Court has held only that the right to counsel applies to post-indictment lineups. Petitioner seeks to have this holding broadened. There are strong reasons not to broaden the right to counsel at confrontations. Post-

indictment lineups are almost certainly not investigatory since they occur after the government has committed itself to prosecute. At post-indictment proceedings the defendant will have his own counsel familiar with the case and able to assist his client to the best of his ability. Pre-indictment lineups may well be investigatory and the government is not committed to prosecute. The suspect may well have no counsel of his own and, even if a quickly appointed or substitute counsel is present, such counsel will be unacquainted with the case and will not be able to remedy this defect without causing serious delay of the lineup. Finally, the bar has neither the personnel capacity to fullfill the obligations of attending pre-indictment lineups.

The "critical stage" reasoning leading to imposition of the right to counsel at lineups is faulty. It defines as a "critical stage" any event where counsel's absence, in effect, might jeopardize the accused's interest in the reliability of the fact finding process. The rationale, which is a departure from past "critical stage" thinking, carries much too far. It would literally require the presence of counsel at every stage of the police investigation of a crime. The rationale would require the presence of counsel at every police or prosecution interview with a witness even those occuring before the suspect is apprehended. The rationale is inconsistent with all the decisions exempting prompt, accidental and photographic confrontations from the right to counsel. Furthermore, there is no evidence that examination by counsel will not elicit facts concerning pre-trial confrontations just as it elicits the far more important facts concerning the circumstances of the crime. Nor is there evidence that deliberate abuse of the confrontation procedure will be prevented by the presence of counsel.

Lastly, counsel is ineffective at lineups. Counsel has no special capacity to regulate confrontations. Even if he had the capacity to do so, he is given no authority to order the police to follow certain procedures. And even if counsel has both the capacity and authority to regulate confrontations, he has no duty to see that they are fair. It is counsel's duty to weight the confrontation unfairly in favor of his client. In many cases, counsel will not object to an unfair confrontation for fear it will be corrected and his client will lose a chance to suppress evidence. Counsel's role is essentially that of a witness. He is not well qualified to play this role. He is subject to the inherent limitation that much which may potentially prejudice his client, e.g. police suggestion to the witness before the confrontation, or the vindictiveness of a victim, cannot be "witnessed" by him. He is subject to the limitations of the cannons of ethics barring him as a witness. In one jurisdiction where the procedure has been studied in actual practice, defense counsel believe that they have no meaningful function, and there is evidence that the confrontation is converted into a forum for discovery and witness intimidation. In some cases, the suspect's appearance has been altered between the offense and the lineup. Counsel is not an effective witness for his client since he is not neutral. More importantly, if counsel succeeds in securing a fair lineup for his client and an identification is made, counsel may become a witness for the prosecution where identification is contested. The testimony, or even the possibility of testimony by counsel against client must destroy any relationship of trust. The grafting of a right to counsel into eyewitness identification procedures was a misstep by this Court. If the problems of suggestive and improper identification procedures are severe, then they can be dealt with through the Due Process Clause. The creation of a right to counsel does not meet those problems.

ARGUMENT

I.

THE RIGHT TO COUNSEL ARISING WHEN AN EYEWITNESS VIEWS A SUSPECT SHOULD BE APPLICABLE ONLY TO POST-INDICTMENT CONFRONTATIONS AND, IN ANY EVENT, SHOULD NOT APPLY TO THE INVESTIGATORY CONFRONTATION IN THIS CASE.

A.

The Right To Counsel At Eyewitness Confrontations: General Rules Of Application And Exception.

The right to counsel at lineups or other identification proceedings may be governed by several measures of application and exception.

There is no court which has held that the right to counsel is applicable to all occasions when an eyewitness sees a suspect. The courts have developed at least five generally recognized exceptions to any blanket imposition of the right to counsel:

(a) The right to counsel does not apply when the suspect is not in custody. *United States* v. *Cox,* 428 F. 2d 683, (7th Cir. 1970) *cert. den.* 400 U.S. 881, *Bratten* v. *Delaware,* 307 F. Supp. 643 (Del. 1969); *Bradford* v. *State,* 118 Ga. App. 457, 164 S.E. 2d 264, *cert. den.* 394 U.S. 1020 (1968); *People* v. *Cezarz,* 44 Ill. 2d 180, 255 N.E. 2d 1 (1969); *State* v. *Bibbs,* 461 S.W. 2d 755 (Mo. 1970); *State* v. *Moore,* 111 N.J. Super 528, 269 A. 2d 534

(1970); *State* v. *Clark,* 2 Wash. App. 2d 45, 467 P. 2d 369 (1970).[1]

(b) The right on counsel does not apply to accidental confrontations, i.e., those not deliberately arranged by the police. *United States* v. *Pollack,* 427 F. 2d 1168 (5th Cir. 1970) *cert. den.* 400 U.S. 831; *People* v. *Martin,* 47 Ill. 2d 331, 265 N.E. 2d 685 (1970); *Commonwealth* v. *D'Ambra,* 70 Mass. Adv. Sh. 513, 258 N.E. 2d 74 (1970); *State* v. *Bibbs,* 461 S.W. 2d 755 (Mo. 1970); *State* v. *Turner,* 81 N.M. 571, 469 P. 2d 720 (N.M. App. 1970); *State* v. *Dutton,* 112 N.J. Super. 402, 271 A. 2d 593 (1970).[2]

(c) The right to counsel does not apply to confrontations occuring shortly after the crime. *Russell* v. *United States,* 408 F. 2d 1280 (D.C. Cir. 1969) *cert. den.* 395 U.S. 428; *United States* v. *Davis,* 399 F. 2d 948 (2nd Cir. 1968) *cert. den.* 393 U.S. 987; *State* v. *Boens,* 8 Ariz. App. 110, 443 P. 2d 925 (1968); *State* v. *Bratten,* 245 A. 2d 556 (Del. Super. 1968); *Robinson* v. *State,* 237 So. 2d 268 (Fla. App. 1970); *People* v. *Bazzelle,* 264 N.E. 2d 457 (Ill. App. 1970) *cert. pndg.,* —— U.S. ——; *Parker* v. *State,* 261 N.E. 2d 562 (Ind. 1970); *Jones* v. *State,* 255 N.E. 2d 219 (Ind. 1970); *State* v. *Smith,* 182 N.W. 2d 409 (Iowa 1970); *State* v. *Meeks,* 205 Kan. 261, 469 P. 2d 302 (1970);

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1. The best illustration of a non-custodial confrontation is that in People v. Cezarz, 44 Ill. 2d 180, 255 N.E. 2d 1 (1969), where the witness was taken to a motel swimming pool, and identified his assailant, who was a guest of the motel, from a large group of people using the pool.

2. The rationale of these exceptions rests upon the absence of police misconduct and upon the absence of suggestiveness whenever the confrontation is truly accidental.

State v. *Lewis,* 255 La. 134, 229 So. 2d 726 (1969); *State* v. *Richey,* 258 La. ——, 249 So. 2d 143 (1971); *Commonwealth* v. *Connolly,* 356 Mass. 617, 255 N.E. 2d 191, *cert. den.* 400 U.S. 843 (1970); *State* v. *Satterfield,* 103 N.J. Super. 291, 247 A. 2d 144 (1968); *Grant* v. *State,* 446 S.W. 2d 620 (Mo. 1969); *State* v. *Hamblin,* 448 S.W. 2d 755 (Mo. 1970); *State* v. *Tounes,* 461 S.W. 2d 761 (Mo. 1970); *State* v. *Madden,* 89 Ore. Adv. Sh. 747, 461 P. 2d 834 (Ore. App. 1969).

(d) The right to counsel does not apply to confrontations involving the use of photographs of the suspect. *United States* v. *Ballard,* 423 F. 2d 127 (5th Cir. 1970); *United States* v. *Hamilton,* 420 F. 2d 1292 (D.C. Cir. 1969); *United States* v. *Bennett,* 409 F. 2d 888 (2nd Cir. 1969) *cert. den.* 396 U.S. 852; *United States* v. *Collins,* 416 F. 2d 696 (4th Cir. 1969), *cert. den.* 396 U.S. 102; *McGee* v. *United States,* 402 F. 2d 434 (10th Cir. 1968), *cert. den.* 394 U.S. 908; *People* v. *Adair,* 2 Cal. App. 3d 92, 82 Cal. Rep. 460 (1969); *People* v. *Hawkins,* 7 Cal. App. 3d 117, 86 Cal. Rep. 428 (1970); *People* v. *Stuller,* 10 Cal. App. 3d 582, 89 Cal. Rep. 158 (1970) *cert. den.* 401 U.S. 977; *Jenkins* v. *State,* 228 So. 2d 114 (Fla. App. 1969); *People* v. *Wooley,* 127 Ill. App. 2d 249, 262 N.E. 2d 237 (1970); *People* v. *Piscunere,* 26 Mich. App. 52, 181 N.W. 2d 782 (1970); *State* v. *Randolph,* 186 Neb. 297, 183 N.W. 2d 225 (1971); *People* v. *Gonzales,* 27 N.Y. 2d 53, 261 N.E. 2d 605 (1970), *cert. den.* 400 U.S. 996; *People* v. *Coles,* 34 App. Div. 2d 1051, 312 N.Y.S. 2d 621 (1970); *State* v. *McVay,* 277 N.C. 410, 177 S.E. 2d 874 (1970); *State* v. *Grays,* 1 Wash. App. 422, 463 P. 2d 183 (1969); *State* v. *Cerny,* 78 Wash. 2d 871 (1971); *Kain* v. *State,* 48 Wis. 2d 212, 179 N.W. 2d 777 (1970).

Some courts have indicated that the right to counsel at photographic identification procedures does exist if the

defendant is in custody. *Thompson* v. *State*, 85 Nev. 134, 451 P. 2d 704 (1969) *cert. den.* 396 U.S. 893; *Commonwealth* v. *Whitney*, 439 Pa. 205, 266 A. 2d 738 (1970) *cert. den.* 400 U.S. 919; *United States* v. *Zeiler*, 427 F. 2d 1305 (3rd Cir. 1970). However, most courts do not follow this rule. See, *United States* v. *Conway*, 415 F. 2d 158 (3rd Cir. 1969) *cert. den.* 397 U.S. 994; *United States* v. *Marsen*, 408 F. 2d 644 (4th Cir. 1968), *cert. den.* 393 U.S. 1056; *Allen* v. *Rhay*, 431 F. 2d 1160 (9th Cir. 1970); *United States* v. *Williams*, 436 F. 2d 1166 (9th Cir. 1970) *cert. den.* 402 U.S. 912; *United States* v. *Serio*, 440 F. 2d 827 (6th Cir. 1971); *United States* v. *Fowler*, 439 F. 2d 133 (9th Cir. 1971); *People* v. *Lawrence*, 4 Cal. 3d 373, 481 P. 2d 212 (1971); *People* v. *Holiday*, 47 Ill. 2d 300, 265 N.E. 2d 634 (1970).

In addition to the various exceptions recognized by the courts, there are, at least in theory, five general rules which might be thought to govern the non-exceptional cases.

First, the right to counsel may apply to all cases in which the suspect is in custody.

Second, the right to counsel may apply to all cases in which the confrontation is accusatory rather than investigatory. This theory resurrects the *Escobedo* concept of focus and would require counsel whenever the state of mind of the police is such that they think the suspect committed the crime and are seeking eyewitness *confirmation* of their pre-existing beliefs. See *United States* v. *Davis*, 399 F. 2d 952 (2nd Cir. 1968).

Third, the right to counsel may apply only after formal charges are filed in court or after preliminary hearing.

Fourth, the right to counsel applies only after indictment.

Fifth, the right to counsel may apply after the retention or appointment of counsel.[3]

In this case, application of any of the general rules, excepting the first, would render the right to counsel inapplicable. Obviously, petitioner here had neither retained nor appointed counsel at the time of the confrontation. Charges had not been filed nor had preliminary hearing been held. Certainly, petitioner was not under indictment. The record also demonstrates that the confrontation was investigatory in nature.

Thomas Kirby was stopped by the police because he resembled a wanted suspect. See *Hill* v. *California*, 401 U.S. 797 (1971). In the course of checking into Kirby's identity, the investigating officers noted that Kirby had in his possession someone else's identification and traveler's checks. Kirby gave false and conflicting explanations as to how he had acquired the property. The investigating officers then placed Kirby under arrest and transported him to the police station. At the time the officers had no knowledge about the robbery itself.

Although the arresting officers had reason to suspect Kirby and to place him under arrest, still, they had no

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3. It should be noted that this fifth rule would today be roughly equivalent to the second rule since Coleman v. Alabama, 399 U.S. 1 (1970), requires the appointment of counsel at preliminary hearing. It should also be noted that under the new Illinois Constitution (effective July 1, 1971) the prosecution cannot, except in a small class of cases, avoid giving a preliminary hearing by indicting before the hearing. See Ill. Const. Article I, Sec. 7.

knowledge on which to base an accusation of robbery. Sometime after arriving at the station the arresting officers learned that the checks had been taken during a robbery from Willie Shard (A. 31). The record does not indicate that the arresting officers had any additional information concerning the details of the robbery. Officer Panepinto testified that he did not see the police report about the robbery until sometime later (A. 36). The arresting officers were not from the Robbery Unit, but were attached to the Public Vehicle Unit (A. 10, 14). According to the testimony of Ralph Bean, the codefendant, the officers did not accuse them of the robbery until after Shard appeared at the station (A. 40-41). The record does not show that any booking procedures had commenced prior to that time.

Kirby and Bean were not taken to the police station to be identified since the arresting officers were not then aware of the robbery. Clearly then, the purpose was to further investigate concerning the ownership of the property. The arrest itself should not be regarded as a stage of the prosecution at which the right to counsel arises. Were this so, prompt confrontations would be impermissable unless the suspect were not under arrest. Nor is there any justification for such a conclusion. As the court said in *United States* v. *Davis*, 399 F. 2d 948, 951-52 (2nd Cir. 1968):

> "We do not read Wade and its siblings as saying that the mere fact of custody, especially when this is for an unrelated crime, automatically triggers the Sixth Amendment right to counsel, as it would the Fifth Amendment privilege against self-incrimation. The importance of custody from a Fifth Amendment standpoint is that it is conceived as furnishing the element of compulsion which that Amendment de-

mands, see Miranda v. State of Arizona, 384 U.S. 436, 467, 86 S. Ct. 1602, 16 L. Ed. 2d 694 (1966). The protection of the Sixth Amendment applies to 'the accused' in 'all criminal prosecutions,' and while Wade makes clear that this includes certain pretrial proceedings, 388 U.S. at 224-225, 87 S. Ct. 1926, that is a long way from saying that the protection attaches as soon as suspicion is aroused. The fact of custody adds little of Sixth Amendment relevance, especially when, as here, this is for an unrelated crime."

Nor does it follow that because the officers subsequently learned that a person named Willie Shard had reported that he had been robbed of some traveler's checks the previous day, everything that ensued from that point on was a part of the prosecution requiring the presence of counsel. No accusations had yet been made, and the arresting officers had little opportunity to learn sufficient details to make any accusations without consulting with Shard. In this respect there is little difference between the confrontation that occurred here and those approved under the prompt confrontation exception. Under the circumstances, it does not follow that the proceedings had reached the accusatory stage or that Shard should not have been allowed to see the suspects in the absence of defense counsel.

B.

The Right To Counsel At Eyewitness Confrontations: The Post Indictment Rule.

It is our contention that under existing law the right to counsel should, as a general rule, apply only to eyewitness confrontations occurring after indictment. Any broader rule would represent an extension of the holdings in *United States* v. *Wade,* 388 U.S. 218 (1967)

and *Gilbert* v. *California*, 388 U.S. 263 (1967), and any extension would be unjustified in either law or policy.

The issue of the applicability of *Wade* and *Gilbert* to pre-indictment confrontations has severely divided the lower courts.[4]

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4. Arizona, Florida, Illinois, Missouri and Virginia have rejected the application of the right of counsel to pre-indictment cases. See State v. Fields, 104 Ariz. 486, 455 P. 2d 964, 965-66 (1969); Perkins v. State, 228 So. 2d 382, 389-90 (Fla. 1969); People v. Palmer, 41 Ill. 2d 571, 244 N.E. 2d 173-75 (1969); State v. Walters, 457 S.W. 2d 817 (Mo. 1970); State v. Crossman, 464 S.W. 2d 36, 40 (Mo. 1970); Buchanan v. Commonwealth, 210 Va. 664, 173 S.E. 2d 792 (1970). So too, seemingly, has Montana, State v. Borchert, 156 Mont. —, 479 P. 2d 454, 455-56 (1971). Maine has adopted the doctrine in an alternative holding. See Trask v. State, 247 A. 2d 114, 116-17 (Me. 1968).

Kansas and New Jersey have acknowledged the issue but have not decided it. See State v. Griffin, 205 Kan. 370, 469 P. 2d 417, 420 (1970); State v. Satterfield, 103 N.J. Super. 291, 247 A. 2d 145 (1968); State v. Moore, 111 N.J. Super. 528, 269 A. 2d 534, 536-37 (1970); State v. Matlack, 49 N.J. 491, 499, 231 A. 2d 369, 373, cert. den. 389 U.S. 1009 (1967).

California, Maryland, Michigan, Ohio, Pennsylvania, Rhode Island and Wisconsin have decided that the right to counsel at lineup applies prior to indictment. See People v. Fowler, 1 Cal. 3d 335, 461 P. 2d 643 (1969); Palmer v. State, 5 Md. App. 691, 249 A. 2d 482, 486 (1969); People v. Hutton, 21 Mich. App. 312, 175 N.W. 2d 860 (1970), (conceding, however, that the *holdings* of Wade and Gilbert apply only to post-indictment cases); State v. Isaacs, 24 Ohio App. 2d 115, 265 N.E. 2d 327 (1970); Commonwealth v. Whitney, 349 Pa. 205, 266 A. 2d 738 (1970), cert. den. 400 U.S. 919 (1970); In re

The language of this Court in *Wade* clearly supports the contention that the holdings in those cases apply only to post-indictment lineups. In *Wade* this Court characterized the issue as "whether courtroom identifications

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Holley, 268 A. 2d 723 (R.I. 1970); Hayes v. State, 46 Wis. 2d 93, 175 N.W. 2d 625 (1970); Accord Commonwealth v. Guillory, 356 Mass. 591, 254 N.E. 2d 427, 429 (1969). Several other courts have assumed that the right to counsel applies prior to indictment. See State v. Singleton, 253 La. 18, 215 So. 2d 838, 841-42 (1968); Thompson v. State, 85 Nev. 134, 451 P. 2d 704 (1969), cert. den. 396 U.S. 893; State v. Wright, 274 N.C. 84, 161 S.E. 2d 581, 587 (1968), cert. den. 396 U.S. 934; Martinez v. State, 437 S.W. 2d 842, 845-46 (Texas 1969); State v. Hicks, 76 Wash. 2d 80, 455 P. 2d 943 (1969).

The federal courts of appeal have also dealt with the question. The Third, Fifth and D.C. Circuits have explicitly rejected any limitation of the right to counsel in post-indictment cases. See Virgin Islands v. Callwood 440 F. 2d 1206, 1207 (3rd Cir. 1971); Long v. United States, 424 F. 2d 799 (D.C. Cir. 1969); Rivers v. United States, 400 F. 2d 935, 937-42 (5th Cir. 1968) (The opinion in Rivers concerned a confrontation occurring shortly after the crime and the Fifth Circuit's application of Wade to the facts before it seems clearly incorrect). The First, Second and Seventh Circuits have assumed implicitly that Wade applies to pre-indictment confrontations. See Cooper v. Picard, 428 F. 2d 1351 (1st Cir. 1970). United States v. Ayers 426 F. 2d 524, 526 (2nd Cir. 1970) cert. den. 400 U.S. 842; United States v. Broadhead, 413 F. 2d 1351, 1354 (7th Cir. 1969) cert. den 396 U.S. 964. The Ninth Circuit has applied Wade to pre-indictment confrontations but has done so on a case by case basis. United States v. Phillips, 427 F. 2d 1035 (9th Cir. 1970) cert. den. 400 U.S. 867 ("for the purpose of this case, we draw no distinction between a pre-indictment and post-indictment lineup" 427 F. 2d at 1037, n. 1).

of an accused at trial are to be excluded from evidence because the accused was exhibited to the witnesses before trial at a post-indictment lineup conducted for identification purposes without notice to and in the absence of the accused's appointed counsel." *United States* v. *Wade*, 388 U.S. at 219. More importantly, this Court itself has on two occasions commented directly on the nature of the *Wade* holding.

In *Gilbert* this Court said of *Wade*, "We there held that a post-indictment pretrial lineup at which the accused is exhibited to identifying witnesses is a critical stage of the criminal prosecution; that police conduct of such a lineup without notice to and in the absence of his counsel denies the accused his Sixth Amendment right to counsel . . ." *Gilbert* v. *California*, 388 U.S. at 272. And in *Simmons* v. *United States*, 390 U.S. 377 (1968) the Court said of *Wade* and *Gilbert*, that "The rationale of those cases was that an accused is entitled to counsel at any 'critical stage of the prosecution' and that a post-indictment lineup is such a 'critical stage'." 390 U.S. at 382-83.

Those courts which have ruled that *Wade* and *Gilbert* apply to pre-indictment confrontations have relied heavily on the language of *Wade* which stated, "In sum, the principle of *Powell* v. *Alabama* and succeeding cases requires that we scrutinize *any* pretrial confrontation of the accused to determine whether the presence of counsel is necessary." It calls upon us to analyze whether potential substantial prejudice to defendant's rights inheres in the particular confrontation and the ability of counsel to help avoid that prejudice." *United States* v. *Wade*, 388 U.S. at 227. This language, however, does not describe the holding of the case. It merely establishes that all

pretrial confrontations are subject to scrutiny by the Court for the purpose of determining whether counsel is required; it does not hold that all pretrial confrontations require counsel. In short, the quoted language defines the scope of the Court's power of inquiry, it does not set forth the results or conclusions of that inquiry.[5]

The courts which have extended *Wade-Gilbert* to pre-indictment confrontations have also relied heavily on the premise that the problems that may exist in post-indictment lineups may also exist in pre-indictment lineups. Assuming the truth of this premise, there is still no justification for assuming that the right to counsel is as appropriate a remedy in a pre-indictment lineup as it is in a post-indictment lineup. Indeed, no court has examined carefully the nature of the remedy in relation to the problems it was designed to solve. Indeed, in the leading case extending the right to counsel, the court expressly stated, "we do not address ourselves in this case to the difficult and perplexing problems which can be expected to arise relative to the role to be played by counsel in the actual line-up process. . . . We assume that counsel's function and role at the lineup itself will be determined in future cases. . . ." *People* v. *Fowler*, 1 Cal. 3d 335, 461 P. 2d at 654, n. 19.

The extension of the right to counsel by the lower courts has not been caused by any detailed analysis of

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5. Those who seek to read the quoted language as part of the holding must resolve the anomaly that it narrows the generally accepted proposition that there is an absolute right to counsel at post-indictment lineups since the language would require the examination of the facts of each "particular confrontation," pre- and post-indictment, to determine whether counsel is required.

the rationale of *Wade-Gilbert.*[6] No court has offered any consistent theory of justification for its extension of *Wade.* We submit that the reason for these decisions is the view of many courts that this Court simply does not mean what it says. The lower courts, in essence, rule not on the basis of existing precedent, but on the basis of their intuition as to what precedent will someday be.

The same sort of intuition moved several courts to hold that *Escobedo* v. *Illinois,* 378 U.S. 478 (1964), required warnings of constitutional rights prior to interrogation despite clear language in that opinion limiting the holding. When this Court did require such warnings in *Miranda* v. *Arizona;* 384 U.S. 436 (1966), it did not do so on the basis of *Escobedo.* In *Miranda* this Court was dealing with a new question for which it offered a new and very extensive rationale. The Court explicitly recognized the difference between *Escobedo* and *Miranda,* in *Johnson* v. *New Jersey,* 384 U.S. 719 (1966). Finally, the Court explicitly affirmed those courts which read the language in *Escobedo* to mean what it said. See *Frazier* v. *Cupp,* 394 U.S. 731 (1969).

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6. The right to counsel at interrogation does, of course, apply prior to indictment. There is a difference between interrogation and lineup cases. In the former cases, the defendant has a clear choice as to whether or not to participate in interrogation and the degree to which he will participate. The broad range of choice present may be said to require that the suspect have the opportunity to consult counsel if he so desires. In lineup cases the defendant exercises no options — he must participate in the lineup. The only purpose counsel serves is to witness the lineup, and this function is not so vital as to require a pre-indictment right to counsel.

In sum, the right to counsel at pre-indictment confrontations is *not* required by *Wade*. The petitioner here cannot properly claim that his rights under *Wade* were violated. His claim is that the existing right to counsel should be expanded to cover his case.

In *Wade* and *Gilbert*, the lineups occurred after indictment. Both defendants had counsel. The appointment of counsel upon indictment is virtually automatic in this country. In *Wade* and *Gilbert* defense counsel both had adequate time to interview their clients. They were in a position to gauge the significance and the likelihood of eyewitness identification. To the extent possible they would be able to render competent assistance to their clients at the lineup without causing delay of the lineup. Finally, the post-indictment lineup has no purpose other than the gathering of evidence against a person whom the government is essentially committed to prosecute. Surely, whatever incentive there is to abuse the identification process is likely to exist largely in cases where the government is committed to prosecute. Under these circumstances, when the adversary process has clearly commenced, the right to counsel might be appropriate.

Where there is no indictment, where the government is not committed to prosecution, the right to counsel is far less appropriate. Where, in addition, defendant has no counsel and the securing of counsel will cause delay, there is still less reason to insist upon a right to counsel. Even if counsel is available, he will necessarily have little, if any, knowledge of the case against his client and will be far from able to advise or assist his client to the best of his ability. Under these circumstances, counsel serves no essential purpose.

There is, furthermore, a substantial difference in the capacity of the bar to meet the obligations of the right to counsel in post-indictment lineups and its capacity to attend all lineups. It has been stated, "The cost of assigning counsel for untold numbers of pre-trial identification proceedings may be so excessive as to prohibit such proceedings entirely. . . . The mandatory presence of counsel at pre-trial identifications would also prove uneconomical for the lawyers themselves, who will not be eager to perform these time-consuming tasks, far removed from the courtroom, and demanding little or no legal skills." Note, Right To Counsel At Pre-Trial Lineup, 63 Nw. L. Rev. 251, 260 (1968); Read, Lawyers At Lineups: Constitutional Necessity or Avoidable Extravagance, 17 U.C.L.A. L. Rev. 339, 378 (1969).

Indeed, the language of the *Wade* opinion envisions its application as limited at least to cases where the defendant has his own counsel.[7] At least until *Coleman* v. *Alabama*, 399 U.S. 1 (1970), many defendants, if not most, did not have their own counsel until they were arraigned after indictment.

The return of an indictment represents more than a meaningless formality. It represents the government's firm decision to proceed against an individual. It solidifies the adverse positions of the parties. It is, in the con-

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7. The language in question involved the discussion of the undecided question as to the permissibility of substitute counsel "where notification and presence of the suspect's own counsel would result in prejudicial delay." United States v. Wade, 388 U.S. at 237. Certainly, substitute counsel is of little value unless he can consult with defendant's regular counsel who knows the facts of the case.

text of lineup cases, a valid point of distinction for the attachment of the right to counsel. Cf. *Massiah* v. *United States*, 377 U.S. 201 (1964).

More significantly, it is our view that counsel at a lineup has so little value that extension of the right to counsel to pre-indictment lineups is completely unjustified. This argument, however, goes to the very validity of *Wade* and *Gilbert* as precedent. Accordingly, we contend in Point II that *Wade* and *Gilbert* ought to be overruled.[8]

II.

THE DOCTRINE THAT THE RIGHT TO COUNSEL ATTACHES AT EYEWITNESS CONFRONTATIONS SHOULD BE REJECTED AND UNITED STATES v. WADE SHOULD BE OVERRULED.

Prior to the decision in *United States* v. *Wade*, 388 U.S. 218 (1967), the concept of a right to counsel at a lineup had been rejected. Eg. *Williams* v. *United States*, 345 F. 2d 733, 734-37 (D.C. Cir. 1965) (Burger, J. concurring). See *Stovall* v. *Denno*, 388 U.S. 293, 300 (1967).

In *Wade*, however, this Court applied the concept of the "critical stage" to lineups. The Court said that the right

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8. The question of overruling could not have been raised below. It is only this Court that can consider the question of overruling its own precedent. Furthermore, the failure to raise a reason or ground for sustaining judgment in the lower court does not prevent an appellee or respondent from raising any ground to defend a judgment in review. "The prevailing party may, of course, assert in a reviewing court any ground in support of his judgment. . . ." Dandridge v. Williams, 397 U.S. 471, 475 n. 6 (1970).

to counsel must arise at any event "where counsel's absence might derogate from the accused's right to a fair trial." *United States* v. *Wade,* 388 U.S. at 226. A lineup was such an event because it was "peculiarly riddled with innumerable dangers and variable factors". *United States* v. *Wade,* 388 U.S. at 235. Since counsel might serve to prevent such dangers, a suspect had the right to counsel at the lineup.

A.

The "Critical Stage" Theory of Wade.

The "critical stage" reasoning in *Wade* was an extension of prior theory that provided counsel in order to protect clearly declared rights, e.g., the right to raise defenses [9] and the privilege against self-incrimination.[10] This theory cannot apply to the lineup because the suspect has no right to refuse to appear in a lineup. In Wade the Court held that "neither the lineup itself nor anything that Wade was required to do in the lineup violated his privilege against self-incrimination." *United States* v. *Wade,* 388 U.S. at 221. Instead of protection of legal rights, the Court was concerned with the reliability of the fact-finding process. The emphasis on reliability is seen both in the Court's comments on the dangers of mistaken identification (*United States* v. *Wade,* 388 U.S. at 228-29, 232-33) and in the exemption from the right to counsel for scientific testing procedures (*Gilbert* v. *California,* 388 U.S. at 266-67).

This new reliability criterion for applying the "critical stage" concept is far too broad. If any stage where

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9. Hamilton v. Alabama, 368 U.S. 52 (1961).

10. Miranda v. Arizona, 384 U.S. 436 (1966).

the reliability of the fact-finding process is endangered is critical, the right to counsel should be required whenever his presence might reduce the danger of unreliable evidence. Literally, counsel would be required at every step of police investigation except in those few instances involving scientific testing.

The consistent course of interpretation of *Wade* by the lower courts has been at odds with the critical stage rationale of the opinion, and this includes those courts which reject the distinction between pre- and post-indictment lineups. A prompt confrontation soon after a crime is no less critical than any other confrontation in the sense that the word "critical" is used in *Wade*. Nor is a photographic display less critical.

Prompt confrontations cannot overcome the defendant's "inability effectively to reconstruct at trial any unfairness that occurred at the lineup." Prompt confrontations do not provide defense counsel with any better "opportunity meaningfully to attack the credibility of the witness' courtroom identification." In truth, prompt confrontations have no effect whatsoever on counsel's ability to confront the identification witness at trial. Yet with perhaps only one exception, courts of review have held that prompt confrontations do not violate *Wade*.

Photographs produced in court cannot assist counsel in searching out non-visual suggestive influences brought to bear on the witness when he was shown the pictures before trial. Whether the photographs produced in court are the same as those previously displayed to the witness depends almost entirely on the veracity of the police, since it is practically inconceivable that the witness would recall after any appreciable length of time any photographs other than the one he identified. The same potential for error

exists in photographic identifications as in corporeal identifications. This Court expressly recognized this fact in *Simmons* v. *United States*, 390 U.S. 377, 385 (1968):

> "It must be recognized that improper employment of photographs by police may sometimes cause witnesses to err in identifying criminals. A witness may have obtained only a brief glimpse of a criminal, or may have seen him under poor conditions. Even if the police subsequently follow the most correct photographic identification procedures and show him the pictures of a number of individuals without indicating whom they suspect, there is some danger that the witness may make an incorrect identification. This danger will be increased if the police display to the witness only the picture of a single individual who generally resembles the person he saw, or if they show him the pictures of several persons among which the photograph of a single such individual recurs or is in some way emphasized. The chance of misidentification is also heightened if the police indicate to the witness that they have other evidence that one of the persons pictured committed the crime. Regardless of how the initial misidentification comes about, the witness thereafter is apt to retain in his memory the image of the photograph rather than of the person actually seen, reducing the trustworthiness of subsequent lineup or courtroom identification."

And yet the vast majority of courts of review have held that the right to counsel as proclaimed in *Wade* does not extend to photographic identifications (See cases cited at Point I, A.).

The "critical stage" test as defined in *Wade* could equally apply to pre-arrest confrontations. There is nothing inherently different between pre- and post-arrest confrontations insofar as they affect counsel's ability to func-

tion at trial. As a practical matter, the effect of a pre-arrest confrontation is generally more adverse to the defendant because in many instances the witness views the suspect without the latter being aware of it. Hence, the defendant's ability to reconstruct the circumstances of the identification is impaired to a greater extent than if he were cognizant of that fact. Here again, however, the courts have declined to hold that pre-arrest confrontations are a critical stage of the prosecution (See cases cited at Point I, A.).

Other problems arise in attempting to apply the "critical stage" concept to other areas of pre-trial proceedings. For example, the argument has been made that counsel must be present when the prosecution is interrogating or preparing witnesses after the defendant has been placed under arrest. (See *United States* v. *Bennett*, 409 F. 2d 888, 898-900 (2nd Cir. 1969)). The argument is not without basis under the rationale expounded in *Wade*. In fact, one court accepted the argument and held that under very limited circumstances counsel was entitled to be present at an interview with the witnessess occurring immediately after a lineup at which counsel had been present. *People* v. *Williams*, 3 Cal. 3d 853, 478 P. 2d 942 (1971). A majority of courts, however, do not subscribe to this view. *United States* v. *Cunningham*, 423 F. 2d 1269 (4th Cir. 1970); *United States* v. *Bennett*, 409 F. 2d 888 (2nd Cir. 1969); *People* v. *Gonzalez*, 27 N.Y. 2d 53, 261 N.E. 2d 605 (1970), *cert. den.* 400 U.S. 996; *State* v. *Giragosian*, 270 A. 2d 921 (R.I. 1970).

One of the most critical stages of the proceedings prior to trial is the grand jury hearing. The same considerations apply to an assay of the consequences of the absence of counsel at the grand jury hearing as apply in the case

of preliminary hearings. (See *Coleman* v. *Alabama*, 399 U.S. 1, 9-10 (1970)). Skilled cross-examination of witnesses could expose weaknesses in the prosecution's case that could lead the grand jury to return a no-bill. The opportunity to examine the witnesses could better enable counsel to impeach a witness at trial. Counsel by his presence at the proceedings could more effectively discover the case that the prosecution has against his client. Thus it could be argued that the "critical stage" test requires that counsel be allowed to attend and participate at the grand jury proceedings. However, Rule 6(d) of the Federal Rules of Criminal Procedure prohibits defense counsel from attending the grand jury hearing, and the rule has been construed to bar the presence of defense counsel even in a case where the defendant was compelled to appear and testify before the grand jury "after suspicion had already focused on [him]." *Gollaher* v. *United States*, 419 F. 2d 520, 523-24 (9th Cir. 1969), *cert. den.* 396 U.S. 960.

As it stands, the "critical stage" test for determining when the right to counsel accrues is difficult to apply. Fidelity to the concept would require the attendance of counsel at virtually all proceedings, including those before the grand jury. Experience has shown that courts have rejected the concept, assigning such reasons for doing so as that the confrontation was prompt, the suspect was not in custody, the confrontation was accidental, and the identification was by photograph (even when the suspect was under arrest).

It might be said that the Court may limit the "critical stage" concept to those cases where the lawyer does not need firsthand knowledge of prior events in order to cross examine effectively the adverse witnesses, *United*

States v. *Wade*, 388 U.S. at 227-28. This limitation can be used to distinguish cases involving blood tests from those involving witnesses only if one assumes that the possibility of honest error is the only danger to be avoided. However, the prime concern of the Court in *Wade* was not honest error, but deliberate abuse. Most of the instances of improper lineups cited in *Wade* involved deliberate suggestiveness, and not honest error, *United States* v. *Wade*, 388 U.S. at 232-34. It is difficult to see how a lawyer can better expose a rigged blood test by cross-examination at trial than he can expose a rigged lineup by the same means.

The Court's assertion in *Wade* that cross-examination of witnesses will fail to convey an accurate idea of what occurred at the lineup is without support. The accused in most cases will be able to see and relate to counsel substantially all that occurred. And what can be hidden from the accused (e.g. peep-hole showup) can be hidden from counsel as well. There is, moreover, no reason to believe that either the police or the lay witnesses will not reveal all the circumstances of the identification. Neither the petitioner here, nor *Wade*, nor *Gilbert*, nor *Stovall* were prevented from reconstructing the circumstances of their confrontations simply because counsel was not present. Each of the cases cited by the Court in *Wade* as examples of improper confrontations involved records of trials held long before there was a right to counsel at lineups. Finally, the most important point of attack on any eyewitness involves his opportunity and ability to observe the criminal at the time of the crime. This most important circumstance can be reconstructed only by means of examining the witness. If we are to accept the capacity of direct and cross ex-

amination to illuminate those circumstances, we must accept the capacity of those same tools to illuminate the circumstances of a pre-trial confrontation.[11]

The "critical stage" rationale of *Wade* is not sound. It is a departure from traditional "critical stage" thinking. It is a doctrine without factual support. It is a theory without logical limits. It should be rejected.

B.

The Inadequacy Of Counsel As A Solution To Confrontation Problems.

The decision in *Wade* is not erroneous solely because it rests on a weak legal rationale. Its most grievous flaw is a practical one; it prescribes a solution that does not meet the problem.

In *Wade* the Court accepted two premises. The first was that eyewitness confrontations were subject to dangers and abuses. The second was that giving suspects a right to counsel at such confrontations would eliminate these dangers and abuses. Subsequent to the decision in *Wade*, there has been severe criticism of the second premise.[12] It has

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11. The pre-trial confrontation will be witnessed by several persons whereas the crime may only be witnessed by one or two, and the stress upon witnesses at the lineup is far less than it is at the crime.

12. e.g., ". . . the use of the lawyer at a lineup is a cumbersome and awkward mechanism for the correction of the kinds of lineup and confrontation abuses pointed out by the Court." Read, Lawyers at Lineups: Constitutional Necessity or Avoidable Extravagance, 17 U.C.L.A. L. Rev. 339, 341 (1969).

"Wade does not apply an appropriate poultice to the sore. Requiring counsel to be present at lineups is sim-

been persuasively argued that the right to counsel is an ineffective remedy for improper lineups. And these arguments have come from those who do not quarrel either with the initial premise that lineups may be subject to abuse or with the right of this Court to supervise state criminal procedure.

It appears from the opinions in *Wade-Gilbert* that counsel essentially serves no significant purpose at a lineup other than that of witness or observer. See *United States* v. *Gholston,* 437 F. 2d 260, 263 (6th Cir. 1971) and *Wright* v. *State,* 46 Wis. 2d 75, 175 N.W. 2d 646, 651 (1971).[13] Nearly every police regulation designed to implement *Wade-Gilbert* restricts the role of counsel to that of an observer. It is generally conceded, even by those who favor a broad application of *Wade,* that the police, and not counsel, are in charge of the identification procedure. See generally, Comment, Right to Counsel at Police Identification Proceedings, 29 U. Pitt. L. Rev. 65, 74-75, 87-88 (1967) (Guidelines developed by the Allegheny County Bar Association and the Pittsburgh Police); Read, Lawyers at Lineups, 17 U.C.L.A. L. Rev. 339, 395-407 (Examples of existing regulations).

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ply not the most effective method of combatting the evils that the opinion so effectively demonstrated do exist." id., at 363.

See also Note, Right to Counsel at Pre-Trial Lineup, 63 Nw. L. Rev. 251, 260 (1968); Note, Lawyers, 77 Yale L. J. 390, 392-93 (1967).

13. ". . . defense counsel required in Wade has no affirmative right to act; he is merely at the identification to observe and later recall his observations in the capacity of a witness at trial . . . a role requiring [no] legal expertise." Note, Right to Counsel at Pre-Trial Lineup, 63 Nw. L. Rev. 251, 259 (1968).

Indeed, it is difficult to imagine what counsel could be at a lineup other than an observer. He cannot be placed in charge of the lineup since he cannot, in keeping with his duty to his client, endeavor to assure a perfectly fair lineup. It would be his duty to devise a lineup in which identification of his client would be as difficult as possible. Counsel has no right to order or advise his client not to appear in a lineup under the doctrines of *Wade-Gilbert*, and, if he does so, his client may become very conspicuous, instead of less so.[14] He can make suggestions to the police to insure that the lineup will be fair, but the police can ignore his suggestions. And, it must be reiterated that counsel's suggestions ought to be directed not at making the lineup fair, but at making it weighted in favor of his client. Further, counsel confronted with a suggestive lineup is faced with a severe tactical problem if he represents (as is true in most cases) a guilty client and there may be a credible eyewitness. If the lineup is suggestive, it is hardly to his client's advantage for the lawyer to see that it is fair and thereby obviate his client's only chance to secure suppression of evidence. There is, to our knowledge, no existing contemporaneous objection rule at lineups, nor is there necessarily a court reporter to record such objections.

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14. In People v. Nelson, 40 Ill. 2d 146, 238 N.E. 2d 378 (1968), a pre-Wade case, defendant was allowed to phone his attorney prior to a lineup and was advised not to participate in the lineup. The lineup was held anyway, but defendant sat in a stairway adjacent to the lineup area and covered his face with his arms. The witness identified defendant anyway and the court affirmed, citing both the independent basis for the identification and the fact that suggestiveness at the lineup was the result of defendant's own actions.

It is, therefore, the presence of counsel as a witness that is supposed to eliminate the dangers and abuses sometimes occurring at lineups. There is good reason to doubt the effectiveness of such a role.

First, the lawyer can hardly "witness" deliberate misconduct that occurs outside the confrontation even though this submerged unfairness may well be more significant in the majority of cases. For example, the lawyer does not know what a policeman may have told the witness before the lineup, nor does he know whether the witness has covertly seen the defendant or his photograph previously. Nor can the lawyer "witness" innocent sources of unfairness such as the defects in the original basis of identification, e.g., poor lighting at the scene of the crime. Nor can the lawyer "witness" the vindictiveness of a witness. The lawyer may well learn of these through pretrial discovery or through cross-examination, yet these techniques were available prior to *Wade-Gilbert* and the presence of counsel at the lineup does not enhance their value. In simple terms, where faulty identification is due to circumstances out of the control of the police and inhering in the character of the witness and his capacity and opportunity to observe — the presence of a lawyer at a lineup serves no purpose. Where faulty identification is due to deliberate police abuse of the identification process, it is clear that the police have ample opportunity to employ effective suggestive methods outside the presence of counsel while adhering to the letter of the law, providing for the right to counsel.

In *Wade* the Court was, of course, concerned about the defendant's inability to reconstruct the lineup in order to attack it at trial. Professor Read analyzed this part

of the Court's opinion citing the Court's contentions and then gave this analysis:

"(a) *Those participating may be police officers.*

How will a lawyer's presence change this and is this an evil in and of itself? It must be remembered that the purpose of a lineup is to aid the police in investigating a crime. Certainly it must be conceded that police should be able to participate in their own investigative techniques.

(b) *The participants' names are rarely divulged.*

The obvious remedy is to require the names to be divulged. In the District of Columbia a "sheet" is routinely kept, listing the names of those participating in the lineup and the names of the conducting officers. The sheet is available to the defense.

(c) *The victim is not an effective witness as to what occurred.*

Neither is the defendant's lawyer. Audio and visual recording devices, photographs, and the like are much more effective. Even a lay observer, in the absence of such devices, would probably make a better witness than the defendant's lawyer. It is my view the jury would be much more likely to believe an independent observer than an accused's own attorney testfying on behalf of his client.

(d) *The victim's outrage may excite "vengeful or spiteful motives" and the victim will not be alert to conditions prejudicial to the suspect.*

A lawyer's presence will not change this. Only regularized lineup procedures that are faithfully followed can minimize suggestive procedures that may point the victim's outrage at the wrong person.

(e) *Neither witnesses nor lineup participants are alert for conditions "prejudicial" to the suspect or schooled in the detection of suggestive influence.*

A lawyer is not necessarily "schooled" in detecting suggestive influences either. A psychologist might be better equipped for the task. Even assuming the lawyer spots such conditions, what can he do about them except prepare himself to be a witness at trial? Certainly any impartial observer, acquainted with the problem and given examples of what to look for, could do as well as any lawyer. Better yet, since the purpose of a lawyer's presence is to acquaint judge and jury with what occurred, photographs, videotapes, or recordings would do this much more vividly. And adoption of regularized procedures might avoid suggestive conditions in the first place.

(f) *Jury will not believe a suspect's version of what occurred.*

Will it be much more likely to believe the suspects' lawyer's version of what occurred? Probably not. Therefore, objective reproduction by mechanical devices again will better counter this evil.[15]

The experience of one jurisdiction where the application of *Wade* was studied hardly sustains the heavy reliance this Court placed upon counsel at a lineup.[16]

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15. Read, Lawyers at Lineups, Constitutional Necessity or Avoidable Extravagance, 17 U.C.L.A. L. Rev. 339, 365-66 (footnotes omitted). To Prof. Read's first comment, we add that when police officers participate in a lineup it is probably easier to reconstruct it than if the fill-ins are taken from the local jail or lockup.

16. The District of Columbia has arranged for the presence of Legal Aid Attorneys at hearings. Prof. Read found that:

After studying that system Professor Read concluded:

"My observations and conversations with police, prosecuting attorneys and defense attorneys have convinced me that the lineup is a necessary tool in the arsenal of investigatory techniques available to the police. However, it is also my view that the pres-

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"Legal Aid seems to concede that under present conditions there is no real reason for defense counsel to appear at the lineup. First, except for minor alterations, the police will not change their set procedures. Second, there is no one there to record any objection that might be made. Legal Aid personnel seem generally to be of the opinion that the presence of an attorney at a lineup is simply not necessary if the attorney is to take a limited role."

and that:

"Experienced police officers and prosecuting attorneys are convinced that any discovery of a witness' name by some defense attorneys is tantamount to disclosure of that name to that lawyer's client. These same police officers and prosecuting attorneys feel that many prospective witnesses are refusing to participate in lineup procedures because of real fear of retaliation from the accused or friends of the accused once a witness' identity is discovered. A particularly sensitive situation evidently exists in the District of Columbia. It was reported that fear of physical intimidation seems especially acute among many Negro witnesses and victims of crime who are asked to cooperate with the police. Police officers charged that the real problem with the lineups is not that witnesses are too susceptible to suggestion but, on the contrary, witnesses are too reluctant to participate freely in the process. Several defense attorneys conceded that a serious problem of witness intimidation does exist and that Wade's command that a lawyer

ence of defense counsel at a lineup is simply not necessary to insure the fairness of the procedure. His passive role renders him basically impotent; he is unable to change the slightest detail in any way unless the police decide to cooperate; he is unable to make and have recorded any objections he may have; and he has no way of preserving what occurred except through his own notes and memory.

Not only is the defense lawyer's presence only minimally effective in preventing unfairness and preserving a record of what occurred, his presence, in certain cases, can actually hinder the administration of criminal justice. Some lawyers have turned the lineup, a police investigatory technique, into a discovery proceeding. A serious danger of intimidation exists in many cases when the identity of witnesses is discovered and disclosed to defendants. Furthermore, by

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be present at lineups may have exacerbated the situation.

Another vigorously raised complaint of police and prosecution attorneys relates to the conduct of defense counsel in altering the appearance of their clients prior to their client's participation in a lineup. For example, a young defendant may be arrested while sporting a mustache, an "Afro haircut" and very bright clothing. When he shows up for the lineup, his Afro haircut is removed, his mustache is shaved off, and he is wearing a suit and tie. An extreme example of this occurred when a female impersonator was arrested in his feminine disguise and then showed up for the lineup in typical male attire. The United States Attorney's Office thus feels that intimidation and disguise of suspects by defense lawyers is the "other side of the coin" from the suggestive influence problem."

Read, Lawyers at Lineups, 17 U.C.L.A. L. Rev. 339, 373-74 (footnotes omitted).

> drastically altering the appearance of defendants, defense counsel can actually nullify the usefulness of the lineup process as an investigatory tool. Wade was intended to protect an accused from suggestive lineup procedures; however, in certain cases, the real effect of the Wade remedy is to destroy the utility of the lineup procedure and to make intimidation of witnesses easier.[17]

Further, we reiterate, the imposition of a right to counsel puts a severe strain on the limited resources of the legal profession. If there is no corresponding benefit to the accused, and we have shown there is not, then there is no justification for imposing this heavy additional burden on the bar. "The use of lawyers primarily as professional witnesses would be an uneconomical use of a scarce talent." Note, Right to Counsel at Pre-Trial Lineup, 63 Nw. L. Rev. 251, 260 (1968).[18] Local jurisdictions might be able to assign a single attorney to serve at all lineups but, apart from the problem of denying a suspect counsel of his choice, these is doubt of the effectiveness of such counsel. In one case, counsel who witnessed several lineups had no personal recollection of the particular lineup in question and was hard pressed to remember whether or not he represented the defen-

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17. Read, Lawyers at Lineups, 17 U.C.L.A. L. Rev. 339, 374-75 (footnotes omitted). It should be borne in mind that Prof. Read's strictures come from a lawyer who is in basic agreement with the Court's purpose in extending federal constitutional review to lineup procedures. 17 U.C.L.A. L. Rev. at 363.

18. "Lawyers are trained to 'defend' in an adversary proceeding . . . it is simply a waste of their time and talents to employ them as passive observers." Read, Lawyers at Lineups, 17 U.C.L.A. L. Rev. 339, 378.

dant. See *United States* v. *Randolph*, 443 F. 2d 729, 731-34 (D.C. Cir. 1970).

Finally, even if counsel is thought to diminish unfairness by virtue only of his presence as a witness, the imposition of a right to counsel at lineups is still unjustified. It is unjustified because counsel do not serve well as witnesses. They are prohibited by disciplinary rules from appearing as witnesses for their clients. See DR 5-102, Code of Professional Responsibility of the American Bar Association (and DR 5-102 of the Illinois Code of Professional Responsibility). And a lawyer is hardly to be regarded as fully credible when his testimony serves the party he represents. More importantly, if one assumes that the presence of counsel will be effective in deterring unfair lineups, then some extremely undesirable consequences will ensue. That is, defense counsel may be called to testify against his client. What the lawyer observes at the lineup is not privileged. See 8 Wigmore, Evidence, Section 2292 (McNaughten Rev. 1961); *State* v. *Funicello*, 49 N.J. 553, 231 A. 2d 579, 596-97 (1967), *cert. den.* 390 U.S. 911. If the lawyer has suggested modifications at the lineup and the police have complied with these suggestions, there is no reason why the prosecution cannot bring these facts into evidence to support the fairness of the police and the reliability of the identification. The lawyer may be called to testify if he or his client insists on filing a motion to suppress identification evidence. The lawyer may even be called at trial in those jurisdictions where the witnesses to a pre-trial identification by a victim may testify about that identification.[19]

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19. People v. Gould, 54 Cal. 2d 621, 354 P. 2d 856 (1960); Johnson v. State, 237 Md. 283, 206 A. 2d 138 (1965); Commonwealth v. Johnson, 201 Pa. Super. 448, 193 A. 2d 833 (1963); State v. Simmons, 63 Wash. 2d 17, 385 P. 2d 389 (1963).

See *People* v. *Dozier*, 22 Mich. App. 528, 177 N.W. 2d 694 (1970).

The lawyer who does testify against his client (or who merely contradicts his client's story in some respects) will destroy any relationship of trust between him and his client. The same is true of a lawyer who refuses his client's demand to attack an identification procedure because he personally observed its fairness. Such a lawyer is certain to be subjected to charges of incompetency and betrayal if his client is convicted. In sum, a lawyer cannot serve as both counsel and witness to a lineup, and this conflict in roles is more severe if counsel succeeds in securing a fair lineup than if he fails.

The petitioner may answer that if counsel at lineups is undesirable, than the Court in *Wade* gave the states an alternative which they should have employed. It is true that the opinion in *Wade* did state, "Legislative or other regulations, such as those of local police departments, which eliminate the risk of abuse and unintentional suggestion at lineup proceedings and the impediments to meaningful confrontation at trial may also remove the basis for regarding the stage as "critical", *United States* v. *Wade*, 388 U.S. at 239. Yet, that language was explicitly disavowed by four of six Justices joining in the opinion. *United States* v. *Wade*, 388 U.S. at 246-47 (Black, J.) and 388 U.S. at 262 (Fortas, J. joined by Warren, C.J. and Douglas J.). A fifth Justice implicitly rejected the proposition. *United States* v. *Wade*, 388 U.S. at 245 (Clark, J.). Essentially only one Justice was committed to the notion that regulations may render a lineup non-critical, and the operative word was "may", not "will". This is a slender reed on which to found an argument that the states have an alternative. No state could reasonably be expected to risk the integrity of its

criminal process by adopting an alternative to counsel. And even if the possibility of valid alternatives were clear — it would not be reasonable to expect a state to operate for two or three years under a system it can only hope will win final court approval under the vague guidelines given in *Wade*.[20] The suggestion of an alternative to counsel is, at best, far too tentative and, at worst, illusory.

In the trilogy of eyewitness identification cases, *Wade, Gilbert* and *Stovall,* this Court evinced its concern with eyewitness identification procedures. The Court perceived the existence of a problem. Yet, instead of solving or attempting to solve the problem by regulating lineups, the Court literally threw counsel into the breach. The Court apparently expected counsel to provide solutions to the problems of unfair lineups. This expectation was unjustified. Furthermore, counsel are not better qualified than the court to determine rules for fair lineups and are not, in any event, empowered to order changes in police procedure. Most importantly, it is not the duty of counsel to insure fairness. Assuming that defense counsel was both qualified and authorized to make changes in lineup procedures, counsel would be obliged to exercise both his

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20. The only attempt to rely on the suggestion that regulations might obviate the right to counsel has been rebuffed with the reasoning that such regulations would be adequate only if they succeeded in elevating eyewitness identification procedures to the level of reliability present in procedures for analyzing fingerprints, blood samples and hair. See People v. Fowler, 1 Cal. 3d 355, 461 P. 2d 643, 652 (1969). If this is the standard to be met by legislation or regulation, then acceptable regulation is impossible. It is, in fact, difficult to see how the right to counsel can succeed in elevating eyewitness identification to the level of scientific reliability.

skill and his authority in the service of his client, and not in the service of fairness.

It is our view that the explicit holding in *Stovall* that federal and state courts were empowered to examine pre-trial confrontations to determine whether they were so unnecessarily suggestive as to violate due process is an adequate solution to whatever problems arise at line-ups. The power of courts to exclude evidence obtained by suggestive confrontations is surely a sufficient remedy for anyone aggrieved by such a confrontation. The power of courts to review pre-trial confrontation practices allows the courts to develop, on a case-by-case basis if necessary, rules to govern lineups. By overruling *Wade*, this Court will *not* put out of the reach of federal courts serious questions of fairness of pre-trial confrontations.[21]

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21. In truth, from the point of view of the prosecutor Stovall is far more significant a case than Wade. This is true because as a practical matter only the application of Stovall can cause the loss of the entire testimony of a witness. The worst consequence of a violation of Wade-Gilbert is the suppression of evidence of a pre-trial identification by a witness.

To illustrate this, assume a case arising this year where a defendant is placed in a line-up without waiving counsel. Wade-Gilbert has been violated. But assume that the line-up is perfectly fair, consisting of seven men of the same height, hair color, race and general appearance, all similarly dressed. If the victim identifies the defendant, the victim will not be able to testify concerning the line-up. But the witness will be able to make a courtroom identification because it is clear that a perfectly fair line-up could not have tainted the courtroom identification. See Nielsen v. State, 456 S.W. 2d 928 (Texas 1970). Indeed, the fairness of the line-up itself, coupled with a positive identification, is clear and convincing evidence that the wit-

The insertion of counsel into a role which he has neither the capacity, authority or ethical obligation to fulfill adequately represents a misstep by this Court. If the error in this Court's decision could not have been seen in June of 1967 — it can be clearly seen today. If this Court still believes that the problem of suggestive lineups is a serious one meriting federal intervention, then the Court is fully able to adopt direct and meaningful regulations. In any event, this Court ought to overrule *Wade* and allow counsel to return to his role as advocate for his client and abandon his ill-conceived role as a "neutral" witness and "presence" at police lineups.

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ness had a strong basis for identification prior to the line-up. The ease with which a court can sustain an identification when the pre-trial procedures have been exemplary is found in Butler v. State, 226 Ga. 56, 172 S.E. 2d 399 (1970). It is apparent from this example that the existence of a Stovall violation is of far greater consequence than a Wade-Gilbert violation. The former tends to impugn the integrity of the witness' courtroom identification while the latter does not. In those jurisdictions where the prosecution is prohibited from showing that a witness made a prior identification the effect of Wade-Gilbert alone is negligible. See 4 Wigmore, Evidence, Sec. 1130 (3rd Ed. 1940); 71 A.L.R. 2d 449; Clemons v. United States, 408 F. 2d 1230, 1242-43 (D.C. Cir. 1968), cert. denied 394 U.S. 964; Prideaux v. State, 473 P. 2d 327 (Okla. 1970). In those jurisdictions where evidence of pre-trial identification is admissible, a Wade-Gilbert violation has some strategic effect because the fact that a line-up was conducted and the witness did identify the defendant is helpful, though not essential, to the prosecution.

CONCLUSION

For the reasons stated the State of Illinois respectfully requests that the judgment of the Appellate Court of Illinois, First District, be affirmed.

Respectfully submitted,

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IN THE

Supreme Court of the United States

October Term 1971.
No. 70-5061

THOMAS KIRBY,

Petitioner,

vs.

STATE OF ILLINOIS,

Respondent.

On Writ of Certiorari to the Appellate Court of the State of Illinois, First District

BRIEF OF AMICUS CURIAE IN SUPPORT OF RESPONDENT

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SUBJECT INDEX

TABLE OF AUTHORITIES CITED

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BRIEF OF AMICUS CURIAE IN SUPPORT OF RESPONDENT

Interest of Amicus Curiae

The State of California, as the most populous of the fifty States, has in the past four years had substantial experience through its law enforcement agencies in attempting to conform police identification procedures to the 1967 rulings by this Court in *United States v. Wade,* 388 U.S. 218, *Gilbert v. California,* 388 U.S. 263, and *Stovall v. Denno,* 388 U.S. 293.

Moreover, the State of California desires to indicate to this Court the opinion of *amicus curiae* that the holding in *People v. Fowler,* 1 Cal. 3d 335 [461 P.2d 643] (1969), relied upon by the present petitioner, is erroneous in its conclusion that the above-cited decisions of this Court require the presence of counsel at lineups conducted prior to the indictment stage of a criminal proceeding.

Question Presented

The petition for writ of certiorari was granted limited to the following question:

> "Whether due process requires that an accused be advised of his right to counsel prior to a pre-indictment showup at a police station several hours after his arrest and forty-eight hours after the alleged crime occurred." (A. 55.) 402 U.S. 995.

Statement of the Case

A. History of the Case

In an indictment returned by the Grand Jury before the Circuit Court of Cook County, Illinois, on April 8, 1968, petitioner Thomas Kirby and Ralph Bean were jointly charged with the robbery of Willie Shard. Counsel was appointed to represent petitioner, and a plea of not guilty was entered. (A. 1.)

Petitioner moved to suppress certain identification testimony and physical evidence, which motions were denied. (A. 1-2, 49.) Bean's motion to suppress physical evidence seized from his person at the time of his arrest was granted. (Pet. Br. 5; Resp. Br. 4.) Trial was by jury, and after the trial court's denial of petitioner's motion for a directed verdict, petitioner was found guilty as charged. (A. 2.)

Petitioner's motions for new trial and in arrest of judgment were denied. On August 1, 1968, petitioner was sentenced to the state penitentiary for a term of five to twelve years. (A. 2.)

Petitioner filed notice of appeal. (A. 2.) On March 10, 1970, the Appellate Court of Illinois, First District, Second Division, affirmed the judgment of conviction in an opinion reported as *People v. Kirby*, 121 Ill.

App. 2d 323 [257 N.E.2d 589] (1970). (A. 3, 49-54.) On October 5, 1970, the Supreme Court of Illinois denied petitioner's petition for leave to appeal. (A. 3.)

The petition for writ of certiorari and motion to proceed *in forma pauperis* were filed on December 3, 1970, and were granted by this Court on May 24, 1971. (A. 3, 55.) 402 U.S. 995.

B. Statement of Facts[1]

At 4:30 p.m. on February 20, 1968, Willie Shard was accosted by two men. He "got a real good look at them" when both of them approached him, while they were robbing him, and also when they departed. One grabbed him around the neck and the other removed the contents of Mr. Shard's pockets, which comprised $140 in traveler's checks, $30 or $35 in cash, his wallet, and all his identification cards, including his social security card. (A. 18-20, 22-23, 27-28.)

On the following morning Mr. Shard went to the police station and reported the crime. (A. 20-21, 23.) He gave the police a detailed physical description of his assailants: both had dark brown skin, were between 5'5" and 5'7" in height, and weighed 140-150 pounds.[2] (A. 23.)

On February 22, 1968, the day after Mr. Shard had reported the robbery to the police, Police Officers Rizzi and Panepinto were on patrol in Chicago. At ap-

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[1]In view of the issue before this Court, the Statement of Facts is taken from both the trial and the hearings on the pretrial motions to suppress identification testimony and physical evidence.

[2]At one of the pretrial hearings petitioner was described by one of the police officers as approximately 5'5" in height. Petitioner's weight is not reflected by the record. (A 13.)

proximately 11:00 a.m. Officer Panepinto observed two male pedestrians, whom he subsequently identified as petitioner and Bean, and remarked, " 'there goes a guy [meaning petitioner] that looks like he's on the Daily Bulletin.' " (A. 29-30, 33-34).

The two men were shown the bulletin, which bore the photograph of a suspect. (A. 11.) Petitioner was asked whether his name was Hampton, the suspect listed on the bulletin as "wanted in the first area for con game." When petitioner responded in the negative, Officer Panepinto said, " 'You sure look like Hampton. Show some identification.' " Upon opening his wallet and while it was still in his hand, petitioner revealed the presence of traveler's checks and a social security card all bearing the name Willie Shard.[8] Asked what they were, petitioner responded, " 'This is play money.' " Asked who was Willie Shard, he stated, " 'Oh, I won it in a crap game.' " The two men were then placed under arrest and were brought to a large squad room in the police station, where it was determined that the traveler's checks had been taken in the robbery of Willie Shard. (A. 10, 13, 15, 30-31, 35, 47.)

A "couple of hours later" Mr. Shard arrived at the station. (A. 31.) He had received a call asking him (Shard) to come down to the station. Mr. Shard and Officer Marsicek testified at trial that the two policemen who brought Shard to the station "didn't tell me anything. They just asked was I robbed and I said

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[8]Bean was searched at this time and was found to have on his person other items of identification bearing the name Willie Shard. (A. 12.) However, the physical evidence obtained from Bean's person was ordered suppressed at the hearing on the pretrial motion. (Pet. Br. 5; Resp. Br. 4.)

'yes.' They said, they asked me did I know them if I seen them and I told them 'yes.'." (A. 21, 24, 46-48.)

After arriving at the station, Mr. Shard "walked in and he said, 'Those are the two men that robbed me.'" No one prompted him or coached him prior to his entering the room. (A. 31.) His identification was "instantaneous." (A. 36.) Other persons were present, but Mr. Shard did not "pay much attention" to them. (A. 24, 26.) Thereafter petitioner and Bean were asked to stand up, and Mr. Shard remarked, "'These are the men.'" (A. 31-32.) Mr. Shard had not been told that his traveler's checks had been found on the two suspects whom he identified. (A. 27.) Mr. Shard testified that no police officer made any suggestion to him regarding the identity of the two men at the station. (A. 21.)

Both petitioner and Bean testified that they were not advised of "a right to have an attorney present prior to be[ing] identified by the victim." (A. 16-17.)

At the trial Mr. Shard was asked to observe petitioner and codefendant Bean and again indicated that he was "sure" that they were the persons who had robbed him. (A. 28.)

Summary of Argument

This Court should reconsider its restrictive holdings in the *Wade* and *Gilbert* cases because requiring the presence of counsel at pretrial identification confrontations is a burdensome and ineffective method of dealing with abuses in this area. Counsel has no right to prevent or alter the conduct of a lineup and may actually interfere with the lineup. Counsel's only useful

function would be that of a witness (a poor one) to the confrontation, a role which conflicts with counsel's professional ethics. Nor is it apparent why a pretrial lineup, unlike either the indictment procedure itself or other identification procedures, is so crucial a stage as to require the presence of counsel.

In the alternative these considerations at least militate against extending the rules of *Wade* and *Gilbert* to pre-indictment identifications, particularly since those decisions speak in terms of *post*-indictment lineups conducted long after counsel had been appointed. The pre-indictment stage is a non-critical one because until the indictment or other accusatory pleading is filed, the objective of law enforcement officials is merely to identify the perpetrator of the offense, not to convict him. Thus the delay attending the requirement that counsel be present would only serve to delay the innocent suspect's exculpation and release without protecting his rights or those of the guilty defendant.

The facts of the present case provide a graphic illustration of the non-critical nature of the identification stage and of the needless burden imposed by a requirement that counsel be present. If the presence of counsel was required a couple of hours after petitioner's arrest, trial courts will be hard-pressed to decide at what point, up to and including the on-the-scene confrontation, the right to counsel ceases to exist.

ARGUMENT

Experience Having Shown That the Rules Promulgated in the Wade and Gilbert Cases Do Not Effectively Serve the Purpose of Protecting the Rights of Criminal Suspects, the Restrictive Holdings of These Cases Should Be Reconsidered or in Any Event Should Not Be Extended so as to Require Uselessly the Presence of Counsel at Pre-Indictment Confrontations

In 1967 this Court held that a post-indictment lineup, in which the suspect is displayed to potential witnesses for the purpose of possible identification, is a critical stage of the proceedings against an accused and that the suspect therefore has a right to counsel at the lineup. *Gilbert v. California,* 388 U.S. 263; *United States v. Wade,* 388 U.S. 218. The Court also held that an in-court identification by a witness to whom the accused was exhibited prior to trial in the absence of counsel must be excluded unless it can be established that the in-court identification was untainted by the pre-trial identification.

However in *Stovall v. Denno,* 388 U.S. 293, the Court, recognizing that "it may confidently be assumed that confrontations for identification can be and often have been conducted in the absence of counsel with scrupulous fairness and without prejudice to the accused at trial," *id.*, 299, found that considerations of justice permitted restricting the *Wade-Gilbert* rules to prospective application, unlike the right to counsel at trial or on appeal from a criminal conviction. Undoubtedly the Court's willingness thus to restrict its newly-promulgated rules was premised in part upon the availability of basic due process grounds as a basis upon which to attack pre-*Wade-Gilbert* lineups.

While perhaps attractive on a theoretical level, the rules requiring the presence of counsel at post-indictment confrontations present numerous substantial difficulties (some insurmountable) in their practical application, without effectively adding to the protection of an accused's rights. It is for this reason that *amicus curiae* joins respondent in urging this Court to reconsider its experiment of four years in effecting the right to counsel by means of rules excluding lawyerless confrontations.

As one scholarly inquiry points out,

> ". . . . the precise role the lawyer is to play at lineups is not immediately clear, nor does the Court make it so. There is, moreover, reason to question how effectively the lawyer can perform any of the several tasks expected of him."
>
> Note, *Lawyers and Lineups*, 77 Yale L.J. 390, 393 (1967).

Another commentator notes,

> "A review of the role of counsel at lineups indicates the limited nature of the services he can perform. In fact, there are some indications that a lawyer's presence may hinder the effective use of the lineup as an investigatory technique. . . ."
>
> Read, *Lawyers at Lineups: Constitutional Necessity or Avoidable Extravagance?*, 17 U.C.L.A. L. Rev. 339, 394 (1969).

> "[T]he use of the lawyer at a lineup is a cumbersome and awkward mechanism for the correction of the kinds of lineup and confrontation abuses pointed out by the Court. Less time consuming, more appropriate tools are readily available. . . ." *Id.*, 341.

Congressional reaction to the *Wade-Gilbert* rules is unambivalently disapproving. *See* 18 U.S.C. § 3502; 114 Cong. Rec. 6039-42 (daily ed. May 21, 1968).

Among the reasons for this Court to reconsider its closely-decided holdings in the *Wade* and *Gilbert* cases are the following:

1. A lawyer clearly has no right to prevent the police from conducting a particular type of pretrial identification, nor to alter the conduct of the confrontation. Because this Court held that the placing of a suspect in a lineup does not violate his privilege against self-incrimination, the lawyer may not advise his client to refuse to be observed in the lineup or to refuse to utter words for voice-identification purposes. Thus the presence of an attorney is at best useless at the time of the lineup and may even encourage unlawful obstructionism on his part. *Cf. People v. Williams,* 3 Cal. 3d 853 [478 P. 2d 942] (1971). The lawyer will view his duty not as that of ensuring a fair lineup designed to ascertain the true identity of the offender, but instead as that of preventing his client from being identified as the perpetrator of the offense under investigation. *See* dissenting opinion of White, J., in *United States v. Wade, supra* at 256-58.

2. Particularly if *Wade* and *Gilbert* are extended to pre-indictment lineups (especially where conducted in small communities or rural areas, or where an individual of unusual physical characteristics is involved), the presence of counsel results in impossible demands for a lineup of persons of almost identical height, weight, hair color, skin color, body type, and ethnic origin that would tax the resources of even the central-casting department of a major motion picture studio,

let alone the average police station whose time, energy, and manpower are usually fully employed in performing the more traditional law enforcement tasks of detecting and apprehending those suspected of crime, and responding to the multitude of calls for assistance that characterize the day-to-day functions of police departments. Is the role of the police officer conducting the lineup to be reduced to that of a stage manager—or is defense counsel to assume such a role? Difficult questions also arise with respect to the manner in which law enforcement agencies may properly obtain, or detain, the cast for a lineup that is deemed constitutionally desirable by counsel.

3. The presence of an attorney at the lineup is of use at the trial only to the extent that the attorney, contrary to professional canons of ethics, may become a witness as to the circumstances attending the conduct of the lineup. Thus in this capacity the attorney is hardly useful at trial; he makes a poor witness, and could more effectively be supplanted by almost anyone else who was present at the time of the lineup.

4. It is difficult to perceive, especially in light of the foregoing observations, what is so particularly crucial about a post-indictment lineup that would constitutionally require the presence of counsel, since counsel is not viewed as an essential participant at the grand jury proceedings which themselves lead to an indictment; a suspect who choses to testify before the grand jury has no right to have his counsel present, nor may his counsel attend and cross-examine the witnesses who appear. Nor apparently does counsel have any constitutionally required role to play when a suspect is called upon to give other physical, nontestimonial evidence against himself, nor when an identification pro-

cedure is employed which utilizes a series of photographs of possible suspects, *Simmons v. United States*, 390 U.S. 377, or when a photograph of a lineup is shown for identification purposes. *People v. Lawrence*, 4 Cal. 3d 273 [481 P.2d 212] (1971), *petition for cert. pending*.

Amicus curiae submits in the alternative that in the event this Court is unwilling to reconsider its holdings in the *Wade* and *Gilbert* cases, it should at least refuse to extend them to the pre-indictment stage of criminal proceedings. The state and lower federal courts are divided on this question (see Resp. Br. pp. 16-17 (n.4)), and *amicus curiae* submits that the California Supreme Court's extension of *Wade-Gilbert* to the pre-indictment stage was not compelled by those decisions and should not be followed. *See People v. Fowler*, 1 Cal. 3d 335 [461 P.2d 643] (1969).

As Respondent's Brief points out, the holdings in *Wade* and *Gilbert* are couched in terms of the confrontations in issue being *post*-indictment lineups. *See also Simmons v. United States*, 390 U.S. 377, 382-83. Necessarily the situation can clearly be distinguished where law enforcement officers conduct a lineup subsequent to the indictment or information stage, *i.e.*, a stage by which counsel has already been retained or appointed, without the officers notifying such counsel.[4]

Moreover, like the indictment procedures themselves, the pre-indictment lineup or showup is not so critical a stage of the proceedings as to require the presence of counsel, for the reason that until a charge is filed the

[4]The lineup in *Wade* took place 15 days after appointment of counsel and 39 days after arrest. 388 U.S. at 220. The lineup in *Gilbert* was 16 days after indictment and after appointment of counsel. *Id.*, 269.

objective of law enforcement officials is merely to identify the perpetrator of the offense in question and not to convict him. Thus the innocent suspect in particular has a common, non-adversary interest with the police: the expeditious conduct of an identification procedure which may bring about his release from custody.

The arguments advanced above in support of a reconsideration of *Wade-Gilbert* militate *a fortiori* against extending the rules of those cases to lineups conducted prior to the indictment stage. If the police must delay the identification confrontation until counsel's convenience may be suited (or until counsel may be appointed), perhaps subjecting the preferences of the police and the identifying victims and witnesses to the whim of counsel, the conducting of lineups will probably be delayed in most cases until after the indictment stage, and the innocent suspect's exculpation and release will therefore be delayed.[5]

A rule requiring the presence (or waiver) of counsel a mere two or three hours after the arrest, the circumstances presented in the case at bar, would not be susceptible of easy administration by the courts, which would be hard-pressed to draw a reasoned distinction between those situations where the right to counsel attached and those where it did not. It would be difficult to formulate practical rules permitting a confrontation between victim and suspect in the absence of counsel near the scene of the crime, moments after the crime, while perhaps forbidding such a confron-

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[5] "'If innocent men had been apprehended should they await the assembling of a lineup, and the summoning of counsel, while the real perpetrators put more time, and presumably distance, between themselves and the focal point of the offense?'" *People v. Floyd*, 1 Cal. 3d 694, 714 [464 P.2d 64, 76] (1970). *See also Stovall v. Denno*, 388 U.S. 293, 302.

tation twenty minutes or an hour later at the neighboring police station or elsewhere.[6]

Finally, the facts of the present case (set forth in detail at pages 3-5, *infra*) graphically illustrate the inutility of counsel at an identification confrontation, particularly one conducted at the pre-indictment stage, and the pointless burden which a pre-indictment requirement of counsel would place upon the administration of justice.

On the day after the commission of the robbery in question, petitioner and another suspect were arrested, and a "couple of hours later" (A. 31) the victim arrived at the police station where the two suspects were being held. The victim immediately, and without any influence or suggestion by the officers, walked up to the two suspects and identified them as his assailants.

Since petitioner had to have counsel appointed at trial (A. 1), presumably he would have been unable to retain counsel at the confrontation. It is hard to imagine that the Constitution required the Chicago police officers to obtain counsel to represent petitioner at the confrontation between petitioner and the victim within a "couple of hours" (A. 31) after petitioner's arrest.

And if the police were constitutionally compelled to delay the confrontation until whatever time counsel

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[6]The California Supreme Court has held *Wade-Gilbert* applicable even to pre-arrest confrontations. *People v. Martin*, 2 Cal. 3d 822, 825-28 [471 P.2d 29, 31-34] (1970). That court has also held that a waiver of rights upon interrogation does not waive rights at a lineup conducted later the same day, *People v. Banks*, 2 Cal. 3d 127, 136 [465 P.2d 263, 270] (1970), but that the suspect need not be informed that the purpose of the lineup is possible identification in order for his waiver of counsel to be effective. *People v. Tribble*, 4 Cal. 3d 826, 833-34 [484 P.2d 589, 594] (1971).

could be obtained, a clear-cut illustration is presented of how petitioner, if innocent of the charges, would needlessly have had to remain in custody and how the police investigation of the robbery would have had to remain in limbo pending the outcome of the delayed confrontation.

The non-critical nature of the identification confrontation in the context of a constitutional requirement of counsel is apparent from the fact that the victim had a "real good look" at the two suspects at the time of the robbery (A. 18-19, 22-23, 27-28) and was able to furnish a detailed and apparently accurate physical description of the suspects to the police prior to petitioner's arrest. (A. 13, 23.) Moreover, at the time of his arrest, petitioner had on his person traveler's checks and a social security card all bearing the victim's name, a circumstance concerning which petitioner gave conflicting and evasive explanations. (The victim was unaware of the incriminating property found on the suspects when he made the identification.) And the victim's observation of his assailants at the time of the robbery was sufficient to enable him to make a "sure" identification of them in court. (A. 28.)

What could counsel have done for petitioner had he been present at the stationhouse confrontation between the victim and the two suspects two hours after the arrest? In what way would the fairness of petitioner's trial have been enhanced had counsel been present at the confrontation? Could petitioner's identification as one of the robbers of Willie Shard have been altered, or the issue of petitioner's guilt or innocence been affected, by the presence of an attorney at the showup?

To ask these questions is to place the abstract question presently before this Court in the constitutionally pertinent context of the practical realities which daily confront police officers, prosecutors, and defense attorneys. And the obvious answers to these questions compel the conclusion that this Court's formulation of a rule of constitutional law requiring the presence of counsel at all pretrial identification confrontations would be the implementation of a meaningless ritual contrary to the interests of innocent suspects, useless as a protection of the rights of innocent or guilty suspects, needlessly burdensome on law enforcement agencies, and unsusceptible of application in the trial courts.

Conclusion

For the foregoing reasons *amicus curiae* State of California joins respondent State of Illinois in urging that the judgment of the Appellate Court of Illinois be affirmed.

Respectfully submitted,

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No. 6401

In the Supreme Court of the United States

THOMAS KIRBY,

Petitioner,

vs.

PEOPLE OF THE STATE OF ILLINOIS,

Respondent.

PETITIONER'S REPLY BRIEF

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PETITIONER'S REPLY BRIEF

Introduction

Recognizing that no meaningful distinction can be drawn between the instant case and this Court's decisions in *United States* v. *Wade,* 388 U.S. 218 (1967) and *Gilbert* v. *California,* 388 U.S. 263 (1967), the State of Illinois urges that these decisions be overruled. The State concedes that eyewitness identifications are subject to serious dangers and abuses, but contends that the presence of counsel does nothing to alleviate the possible evils inherent in the pre-trial identification process.

In the course of its argument that the confrontation in this case was in the investigatory rather than the accusatory stage, the State reverses its position taken before the Illinois Appellate Court and concedes that petitioner was arrested on suspicion, so that the officers could further investigate the ownership of the property taken from him. (Brief pp. 13-14.) The police, however, have no probable cause to arrest merely on the basis of suspicion. *Henry* v. *United States*, 361 U.S. 98 (1959). The State's candid admission that there was no ground upon which petitioner could have been legally arrested is made for the first time in this Court. Had the State been equally candid below, the Illinois Appellate Court would have reversed petitioner's conviction on the same grounds it reversed the conviction of petitioner's co-defendant, Ralph Bean. *People* v. *Bean*, 121 Ill. App.2d 332, 257 N.E.2d 562 (1st Dist. 1970).

I.

Wade and Gilbert Secure Fundamental Rights and These Decisions Should Not Be Reversed.

Beginning with *Powell* v. *Alabama*, 287 U.S. 45 (1932), the first major case construing the Sixth Amendment right to counsel, this Court has consistently held that counsel is required at all critical stages of the criminal process. In *United States* v. *Wade*, 388 U.S. 218 (1967), and *Gilbert* v. *California*, 388 U.S. 263 (1967), this Court noted that mistaken identification testimony is a major factor contributing to the high incidence of miscarriage of justice and that the accused is not always able to detect the suggestive influences present at the identification confrontation. 388 U.S. at 228-232. These decisions correctly noted that the accused's guilt is for all practical purposes determined at the identification confrontation. 388 U.S. at 229. This Court properly held that the accused is as much entitled to counsel at the identification confrontation as the trial itself. 388 U.S. at 237.*

That *Gilbert* and *Wade* were correctly decided cannot be seriously questioned. The right to counsel is basic under our criminal system. The State of Illinois' suggestion that *Wade* and *Gilbert* be overruled ignores the fundamental policy of the Sixth Amendment that counsel be provided at all critical stages of the criminal process.

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* It is to be noted that in civil law countries the identification confrontation is considered a critical stage in the criminal proceedings. The accused is generally afforded the assistance of counsel and in some countries the confrontations must take place before a judicial officer by means of a formal lineup with a court reporter present. See Murray, *The Criminal Lineup at Home and Abroad*, 1966 Utah L.Rev. 610. And see *United States* v. *Wade*, 388 U.S. at 238, n. 29.

II.

No Meaningful Distinction Can Be Drawn Between Wade and Gilbert and the Case At Bar.

The State of Illinois argues alternatively that even if *Wade* and *Gilbert* were rightly decided, the right to counsel recognized in those cases applies only to post-indictment confrontations. (Brief, pp. 9-23; Cal. Brief pp. 11-15.) The influences to which a witness may be exposed at an identification confrontation and which were recognized in *Wade* and *Gilbert* are all blatantly present in the case at bar.

Under Illinois law, petitioner was entitled to consult with counsel immediately upon his arrest. (Ch. 38, §103-4, Ill. Rev. Stat. 1969; see Petitioner's Opening Brief, p. 2) Although the police had petitioner in custody several hours before Shard arrived, the police failed to advise petitioner of his statutory right to counsel. In the absence of counsel, the following occurred.

The witness Willie Shard was telephoned and told by the police that they had picked up two suspects whom they wanted him to identify. (A. 21, 24, 27.) A police officer was sent to pick up Shard and bring him to the police station. (A. 24.) When Shard arrived at the police station, petitioner and Bean, who are black, were seated at a table in a large squad room between Officers Rizzi and Panepinto. (A. 31, 37.) Shard was asked to pick out the two men. (A. 24) It cannot be doubted that petitioner's guilt was effectively and improperly predetermined as a result of the police station showup. Since no lineup was conducted, no pretense was made to ascertain whether Shard could actually identify petitioner as his assailant. Rather, Shard was merely asked to identify his assailants from a group of four persons which consisted of two police officers and the two defendants. The choice was obvious.

The critical stage of the criminal process insofar as identifications are concerned are not those identifications which occur following indictment. The critical identification occurs at the police station. It is here that the victim is asked for the first time to make the identification. If properly conducted, the victim must objectively pick out his assailant from a lineup. At the trial, the witness has no difficulty in selecting his assailant from those present in the courtroom. In the Criminal Court of Cook County, the witness can choose his assailant from among the following: the trial judge, the jurors, the two prosecuting attorneys, defense counsel, the bailiffs surrounding the defendant, and the defendant himself. The identification is thus made by rote. The only time the victim is put to the true test of whether he can identify his assailant is at the police station long before the formal return of an indictment. If the police station identification process is improperly tarnished, as occurred in the case at bar, the defendant is shorn of any chance of proving his innocence.

It may well be that identification confrontations are more critical than police interrogations of an accused. The accused has no personal control whatsoever regarding the conduct of the proceeding, and once the identification is made, it is virtually impossible to remove the association created in the witness' mind. It is difficult to see how any proceeding could have been more critical to petitioner than the identification showup.

The State argues that the identification confrontation should not be considered a critical stage in the criminal process because lower state and federal courts have distinguished *Wade* and have not required the presence of counsel at grand jury proceedings, interviews by the police with State witnesses and photographic identifica-

tions. (Brief, pp. 24-30; Cal. Brief, pp. 10-11.) This Court has not precisely considered whether counsel is required in the three instances raised by the State, but the facts in those instances are not relevant to a determination of this case.

Frequently photographic identifications are conducted at the initial stage of the investigation prior to the time suspicion has focused on a particular witness. They do not involve an immediate personal confrontation between the accused and the witness which for all intents and purposes determines the accused's guilt. The grand jury is a separate procedure provided for by both the Fifth Amendment to the United States Constitution and Article 1, Section 7 of the 1970 Illinois Constitution and has its own unique historical development. The risk that the absence of counsel would derogate from the accused's right to a fair trial is not the same as in an identification confrontation. The grand jury merely determines whether there is a probable cause to prosecute the suspect. Furthermore, the defendant may assert his privilege against self incrimination before the grand jury, and it is very rare in Illinois that the accused is ever even called before that body. A court reporter is present at the grand jury proceedings in Illinois to keep a record of what occurs and the proceedings themselves are secret and cannot be used at trial. (Ch. 38, §112-6, Ill.Rev.Stat. 1969). Certainly defense counsel is not entitled to be present when the State is interviewing its witnesses in the course of trial preparation or in the course of a police investigation.

Contrary to the State's argument (pp. 14-15), *Escobedo* v. *Illinois,* 378 U.S. 478 (1964) and *Miranda* v. *Arizona,* 384 U.S. 436 (1966), where the Court applied the right to counsel to pre-indictment interrogations, are not dis-

tinguishable from the case at bar on the ground that those cases involved Fifth Amendment rather than Sixth Amendment rights. This Court in *Wade* held that no distinction should be drawn between Fifth and Sixth Amendment rights:

> "Of course, nothing decided or said in the opinions in the cited cases links the right of counsel only to protection of Fifth Amendment rights. Rather those decisions 'no more than reflect a constitutional principle established as long ago as *Powell* v. *Alabama*. . . .' *Massiah* v. *United States, supra,* at 205. It is central to that principle that in addition to counsel's presence at trial, *the accused is guaranteed that he need not stand alone against the State at any stage of the prosecution, formal or informal, in court or out, where counsel's absence might derogate from the accused's right to a fair trial.* The security of that right is as much the aim of the right to counsel as it is of the other guaranties of the Sixth Amendment . . . The presence of counsel at such critical confrontations, as at the trial itself, operates to assure that the accused's interests will be protected consistently with our adversary theory of criminal prosecution. Cf. *Pointer* v. *Texas,* 380 U.S. 400.' 388 U.S. at 226-227. (Emphasis supplied)

The Illinois rule that counsel is not required at a pre-indictment show-up violates both the spirit and the letter of this Court's decisions in *Wade* and *Gilbert.* The California rule as announced in *People* v. *Fowler,* 1 Cal. 3d 335, 361 P. 2d 643 (1969), correctly applies the law. Any other ruling would make a sham of *Wade* and *Gilbert.*

> "The pre-indictment post-indictment dichotomy would leave the police in the position to manipulate the applicability of the right to counsel by holding all identification procedures before the indictment, thus defeating the aim of *Wade* and *Gilbert.* The test is too

mechanical and it elevates form over substance." Comment, *The Right to Counsel in Lineup,* 36 U. of Chi. L. Rev. 830 (1969).

III.

The Presence of Counsel was Essential to Assure Petitioner a Fair Trial.

While recognizing that prejudice may occur at an eyewitness confrontation, the State, nonetheless, urges that counsel is not useful at such confrontations. (Brief, pp. 30-43; Cal. Brief, pp. 8-10.) The State fails to recognize that in the case at bar counsel would have served a meaningful function. The confrontation in this case was critical. At trial, Shard identified petitioner and Bean not as the men who robbed him, but as the men he saw at the police station. (A. 21.) As a result of the station house showup, Shard came to associate the men who robbed him with the men pointed out to him at the showup. No amount of cross-examination by defense counsel could remove this prejudice.

Counsel's function in this case therefore would have been much more than that of a mere observer. Counsel could have objected to the prejudicial and suggestive manner in which Shard was asked to point out his attackers.* As the police have no interest in convicting an innocent man, it can be assumed that they would have cooperated with defense counsel if he suggested that a lineup rather than a showup be conducted. Had the police officers refused to cooperate, counsel could have

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* This court recognized in *Wade* that identification confrontations are particularly suggestive when the witness is told the police have caught the suspect and then is asked to point out the suspect alone. 388 U.S. at 233.

taken the matter up with their superiors or requested emergency relief from the Chief Judge of the Cook County Criminal Court. Even if counsel had been forced to assume a more passive role at the confrontation, this Court has recognized that his presence alone "can often avert prejudice and assure a meaningful confrontation at trial." *United States* v. *Wade*, 388 U.S. at 236.

That counsel might later be called as a witness to what transpired at the police station is no valid objection to having him present at the confrontation. Much the same argument can be made against having counsel present at police interrogations of the accused. If a conflict arises, counsel can always withdraw from the case. In Illinois, where there is a public defender system and an active section of the organized bar who represent indigent persons, the attorney who handles pretrial matters frequently does not represent the accused in the criminal trial itself. Counsel comes to the confrontation with his collective legal experience and knowledge of criminal law and proceedings so the accused is not forced "to stand alone" at what may be the most critical proceeding in the whole criminal process.

The State points to no facts in the case at bar to show how it could have been prejudiced by advising petitioner of his right to counsel. The crime had occurred two days earlier and petitioner was in custody at the police station for several hours prior to the time of the confrontation. The police had ample time to advise petitioner of his rights and secure counsel for him. This was not an immediate on-the-scene confrontation and no compelling circumstances prevented the police from informing petitioner of his rights. The police's failure to advise petitioner of his right to counsel prior to the pre-indictment showing deprived him of his right to a fair trial.

CONCLUSION

The decision of the Appellate Court of Illinois should be reversed and this cause remanded with instructions ordering petitioner's release or that he be afforded a new trial at which all identification testimony is excluded.

Respectfully submitted,

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November 8, 1971

KIRBY *v.* ILLINOIS

CERTIORARI TO THE APPELLATE COURT OF ILLINOIS, FIRST DISTRICT

No. 70–5061. Argued November 11, 1971—Reargued March 20–21, 1972—Decided June 7, 1972.

Petitioner and a companion were stopped for interrogation. When each produced, in the course of demonstrating identification, items bearing the name "Shard," they were arrested and taken to the police station. There, the arresting officers learned of a robbery of one "Shard" two days before. The officers sent for Shard, who immediately identified petitioner and his companion as the robbers. At the time of the confrontation petitioner and his companion were not advised of the right to counsel, nor did either ask for or receive legal assistance. Six weeks later, petitioner and his companion were indicted for the Shard robbery. At the trial, after a pretrial motion to suppress his testimony had been overruled, Shard testified as to his previous identification of petitioner and his companion, and again identified them as the robbers. The defendants were found guilty and petitioner's conviction was upheld on appeal, the appellate court holding that the *per se* exclusionary rule of *United States* v. *Wade*, 388 U. S. 218, and *Gilbert* v. *California*, 388 U. S. 263, did not apply to pre-indictment confrontations. *Held:* The judgment is affirmed. Pp. 687–691.

121 Ill. App. 2d 323, 257 N. E. 2d 589, affirmed.

MR. JUSTICE STEWART, joined by THE CHIEF JUSTICE, MR. JUSTICE BLACKMUN, and MR. JUSTICE REHNQUIST, concluded that a showup after arrest, but before the initiation of any adversary criminal proceeding (whether by way of formal charge, preliminary hearing, indictment, information, or arraignment), unlike the post-indictment confrontations involved in *Gilbert* and *Wade*, is not a criminal prosecution at which the accused, as a matter of absolute right, is entitled to counsel. Pp. 687–691.

MR. JUSTICE POWELL concurred in the result. P. 691.

STEWART, J., announced the Court's judgment and delivered an opinion in which BURGER, C. J., and BLACKMUN and REHNQUIST, JJ., joined. BURGER, C. J., filed a concurring statement, *post*, p. 691. POWELL, J., filed a statement concurring in the result, *post*, p. 691. BRENNAN, J., filed a dissenting opinion, in which DOUGLAS and

MARSHALL, JJ., joined, *post*, p. 691. WHITE, J., filed a dissenting statement, *post*, p. 705.

Jerold S. Solovy argued the cause for petitioner on the reargument and *Michael P. Seng* argued the cause on the original argument. *Messrs. Solovy* and *Seng* were on the briefs for petitioner.

James B. Zagel, Assistant Attorney General of Illinois, reargued the cause for respondent. With him on the brief were *William J. Scott*, Attorney General, *Joel M. Flaum*, First Assistant Attorney General, and *E. James Gildea*, Assistant Attorney General.

Ronald M. George, Deputy Attorney General, argued the cause on the reargument for the State of California as *amicus curiae* urging affirmance. With him on the brief were *Evelle J. Younger*, Attorney General, and *William E. James*, Assistant Attorney General.

MR. JUSTICE STEWART announced the judgment of the Court and an opinion in which THE CHIEF JUSTICE, MR. JUSTICE BLACKMUN, and MR. JUSTICE REHNQUIST join.

In *United States* v. *Wade*, 388 U. S. 218, and *Gilbert* v. *California*, 388 U. S. 263, this Court held "that a post-indictment pretrial lineup at which the accused is exhibited to identifying witnesses is a critical stage of the criminal prosecution; that police conduct of such a lineup without notice to and in the absence of his counsel denies the accused his Sixth [and Fourteenth] Amendment right to counsel and calls in question the admissibility at trial of the in-court identifications of the accused by witnesses who attended the lineup." *Gilbert* v. *California*, *supra*, at 272. Those cases further held that no "in-court identifications" are admissible in evidence if their "source" is a lineup conducted in violation of this constitutional standard. "Only a *per se* exclusionary rule as to such testimony can be an effective sanction," the Court said, "to assure that law

enforcement authorities will respect the accused's constitutional right to the presence of his counsel at the critical lineup." *Id.*, at 273. In the present case we are asked to extend the *Wade-Gilbert per se* exclusionary rule to identification testimony based upon a police station showup that took place *before* the defendant had been indicted or otherwise formally charged with any criminal offense.

On February 21, 1968, a man named Willie Shard reported to the Chicago police that the previous day two men had robbed him on a Chicago street of a wallet containing, among other things, traveler's checks and a Social Security card. On February 22, two police officers stopped the petitioner and a companion, Ralph Bean, on West Madison Street in Chicago.[1] When asked for identification, the petitioner produced a wallet that contained three traveler's checks and a Social Security card, all bearing the name of Willie Shard. Papers with Shard's name on them were also found in Bean's possession. When asked to explain his possession of Shard's property, the petitioner first said that the traveler's checks were "play money," and then told the officers that he had won them in a crap game. The officers then arrested the petitioner and Bean and took them to a police station.

Only after arriving at the police station, and checking the records there, did the arresting officers learn of the Shard robbery. A police car was then dispatched to Shard's place of employment, where it picked up Shard and brought him to the police station. Immediately upon entering the room in the police station where the petitioner and Bean were seated at a table, Shard positively identified them as the men who had

[1] The officers stopped the petitioner and his companion because they thought the petitioner was a man named Hampton, who was "wanted" in connection with an unrelated criminal offense. The legitimacy of this stop and the subsequent arrest is not before us.

robbed him two days earlier. No lawyer was present in the room, and neither the petitioner nor Bean had asked for legal assistance, or been advised of any right to the presence of counsel.

More than six weeks later, the petitioner and Bean were indicted for the robbery of Willie Shard. Upon arraignment, counsel was appointed to represent them, and they pleaded not guilty. A pretrial motion to suppress Shard's identification testimony was denied, and at the trial Shard testified as a witness for the prosecution. In his testimony he described his identification of the two men at the police station on February 22,[2] and identified them again in the courtroom as the men

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[2] "Q. All right. Now, Willie, calling your attention to February 22, 1968, did you receive a call from the police asking you to come down to the station?

"A. Yes, I did.

"Q. When you went down there, what if anything, happened, Willie?

"A. Well, I seen the two men was down there who robbed me.

"Q. Who took you to the police station?

"A. The policeman picked me up.

"MR. POMARO: Q. When you went to the police station did you see the two defendants?

"A. Yes, I did.

"Q. Do you see them in Court today?

"A. Yes, sir.

"Q. Point them out, please?

"A. Yes, that one there and the other one. (Indicating.)

"MR. POMARO: Indicating for the record the defendants Bean and Kirby.

"Q. And you positively identified them at the police station, is that correct?

"A. Yes.

"Q. Did any police officer make any suggestion to you whatsoever?

"THE WITNESS: No, they didn't."

who had robbed him on February 20.[3] He was cross-examined at length regarding the circumstances of his identification of the two defendants. Cf. *Pointer* v. *Texas*, 380 U. S. 400. The jury found both defendants guilty, and the petitioner's conviction was affirmed on appeal. *People* v. *Kirby*, 121 Ill. App. 2d 323, 257 N. E. 2d 589.[4] The Illinois appellate court held that the admission of Shard's testimony was not error, relying upon an earlier decision of the Illinois Supreme Court, *People* v. *Palmer*, 41 Ill. 2d 571, 244 N. E. 2d 173, holding that the *Wade-Gilbert per se* exclusionary rule is not applicable to pre-indictment confrontations.

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[3] "Q. Willie, when you looked back, when you were walking down the street and first saw the defendants, when you looked back, did you see them then?

"A. Yes, I seen them.

"Q. Did you get a good look at them then?

"A. Yes, I did.

"Q. All right. Now, when they grabbed you and took your money, did you see them then?

"A. Yes, I did.

"Q. Did you get a good look at them then?

"A. Yes.

"Q. Both of them?

"A. Correct.

"Q. When they walked away did you see them then?

"A. Yes.

"Q. Did you look at them, Willie?

"A. Yes.

"Q. Did you get a good look at them?

"A. Yes.

"Q. Are those the same two fellows? Look at them, Willie.

"A. Correct.

"Q. Are those the same two that robbed you?

"A. Yes.

"Q. You are sure, Willie?

"A. Yes."

[4] Bean's conviction was reversed. *People* v. *Bean*, 121 Ill. App. 2d 332, 257 N. E. 2d 562.

We granted certiorari, limited to this question. 402 U. S. 995.[5]

I.

We note at the outset that the constitutional privilege against compulsory self-incrimination is in no way implicated here. The Court emphatically rejected the claimed applicability of that constitutional guarantee in *Wade* itself:

> "Neither the lineup itself nor anything shown by this record that Wade was required to do in the lineup violated his privilege against self-incrimination. We have only recently reaffirmed that the privilege 'protects an accused only from being compelled to testify against himself, or otherwise provide the State with evidence of a testimonial or communicative nature . . . .' *Schmerber* v. *California*, 384 U. S. 757, 761. . . ." 388 U. S., at 221.

> "We have no doubt that compelling the accused merely to exhibit his person for observation by a prosecution witness prior to trial involves no compulsion of the accused to give evidence having testimonial significance. It is compulsion of the accused

[5] The issue of the applicabiltiy of *Wade* and *Gilbert* to pre-indictment confrontation has severely divided the courts. Compare *State* v. *Fields*, 104 Ariz. 486, 455 P. 2d 964; *Perkins* v. *State*, 228 So. 2d 382 (Fla.); *Buchanan* v. *Commonwealth*, 210 Va. 664, 173 S. E. 2d 792; *State* v. *Walters*, 457 S. W. 2d 817 (Mo.), with *United States* v. *Greene*, 139 U. S. App. D. C. 9, 429 F. 2d 193; *Rivers* v. *United States*, 400 F. 2d 935 (CA5); *United States* v. *Phillips*, 427 F. 2d 1035 (CA9); *Commonwealth* v. *Guillory*, 356 Mass. 591, 254 N. E. 2d 427; *People* v. *Fowler*, 1 Cal. 3d 335, 461 P. 2d 643; *Palmer* v. *State*, 5 Md. App. 691, 249 A. 2d 482; *People* v. *Hutton*, 21 Mich. App. 312, 175 N. W. 2d 860; *Commonwealth* v. *Whiting*, 439 Pa. 205, 266 A. 2d 738; *In re Holley*, — R. I. —, 268 A. 2d 723; *Hayes* v. *State*, 46 Wis. 2d 93, 175 N. W. 2d 625.

to exhibit his physical characteristics, not compulsion to disclose any knowledge he might have. . . ." *Id.*, at 222.

It follows that the doctrine of *Miranda* v. *Arizona*, 384 U. S. 436, has no applicability whatever to the issue before us; for the *Miranda* decision was based exclusively upon the Fifth and Fourteenth Amendment privilege against compulsory self-incrimination, upon the theory that custodial *interrogation* is inherently coercive.

The *Wade-Gilbert* exclusionary rule, by contrast, stems from a quite different constitutional guarantee—the guarantee of the right to counsel contained in the Sixth and Fourteenth Amendments. Unless all semblance of principled constitutional adjudication is to be abandoned, therefore, it is to the decisions construing that guarantee that we must look in determining the present controversy.

In a line of constitutional cases in this Court stemming back to the Court's landmark opinion in *Powell* v. *Alabama*, 287 U. S. 45, it has been firmly established that a person's Sixth and Fourteenth Amendment right to counsel attaches only at or after the time that adversary judicial proceedings have been initiated against him. See *Powell* v. *Alabama*, *supra*; *Johnson* v. *Zerbst*, 304 U. S. 458; *Hamilton* v. *Alabama*, 368 U. S. 52; *Gideon* v. *Wainwright*, 372 U. S. 335; *White* v. *Maryland*, 373 U. S. 59; *Massiah* v. *United States*, 377 U. S. 201; *United States* v. *Wade*, 388 U. S. 218; *Gilbert* v. *California*, 388 U. S. 263; *Coleman* v. *Alabama*, 399 U. S. 1.

This is not to say that a defendant in a criminal case has a constitutional right to counsel only at the trial itself. The *Powell* case makes clear that the right attaches at the time of arraignment,[6] and the Court

[6] "[D]uring perhaps the most critical period of the proceedings against these defendants, that is to say, from the time of their ar-

has recently held that it exists also at the time of a preliminary hearing. *Coleman* v. *Alabama, supra.* But the point is that, while members of the Court have differed as to existence of the right to counsel in the contexts of some of the above cases, *all* of those cases have involved points of time at or after the initiation of adversary judicial criminal proceedings—whether by way of formal charge, preliminary hearing, indictment, information, or arraignment.

The only seeming deviation from this long line of constitutional decisions was *Escobedo* v. *Illinois,* 378 U. S. 478. But *Escobedo* is not apposite here for two distinct reasons. First, the Court in retrospect perceived that the "prime purpose" of *Escobedo* was not to vindicate the constitutional right to counsel as such, but, like *Miranda,* "to guarantee full effectuation of the privilege against self-incrimination . . . ." *Johnson* v. *New Jersey,* 384 U. S. 719, 729. Secondly, and perhaps even more important for purely practical purposes, the Court has limited the holding of *Escobedo* to its own facts, *Johnson* v. *New Jersey, supra,* at 733–734, and those facts are not remotely akin to the facts of the case before us.

The initiation of judicial criminal proceedings is far from a mere formalism. It is the starting point of our whole system of adversary criminal justice. For it is only then that the government has committed itself to prosecute, and only then that the adverse positions of government and defendant have solidified. It is then that a defendant finds himself faced with the prosecutorial forces of organized society, and immersed in the intricacies of substantive and procedural criminal law.

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raignment until the beginning of their trial, when consultation, thoroughgoing investigation and preparation were vitally important, the defendants did not have the aid of counsel in any real sense, although they were as much entitled to such aid during that period as at the trial itself." *Powell* v. *Alabama,* 287 U. S. 45, 57.

It is this point, therefore, that marks the commencement of the "criminal prosecutions" to which alone the explicit guarantees of the Sixth Amendment are applicable.[7] See *Powell* v. *Alabama*, 287 U. S., at 66–71; *Massiah* v. *United States*, 377 U. S. 201; *Spano* v. *New York*, 360 U. S. 315, 324 (DOUGLAS, J., concurring).

In this case we are asked to import into a routine police investigation an absolute constitutional guarantee historically and rationally applicable only after the onset of formal prosecutorial proceedings. We decline to do so. Less than a year after *Wade* and *Gilbert* were decided, the Court explained the rule of those decisions as follows: "The rationale of those cases was that an accused is entitled to counsel at any 'critical stage of the *prosecution*,' and that a post-indictment lineup is such a 'critical stage.'" (Emphasis supplied.) *Simmons* v. *United States*, 390 U. S. 377, 382–383. We decline to depart from that rationale today by imposing a *per se* exclusionary rule upon testimony concerning an identification that took place long before the commencement of any prosecution whatever.

II

What has been said is not to suggest that there may not be occasions during the course of a criminal investigation when the police do abuse identification procedures. Such abuses are not beyond the reach of the Constitution. As the Court pointed out in *Wade* itself, it is always necessary to "scrutinize *any* pretrial con-

[7] "In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the Assistance of Counsel for his defence." U. S. Const., Amdt. VI.

frontation . . . ." 388 U. S., at 227. The Due Process Clause of the Fifth and Fourteenth Amendments forbids a lineup that is unnecessarily suggestive and conducive to irreparable mistaken identification. *Stovall* v. *Denno*, 388 U. S. 293; *Foster* v. *California*, 394 U. S. 440.[8] When a person has not been formally charged with a criminal offense, *Stovall* strikes the appropriate constitutional balance between the right of a suspect to be protected from prejudicial procedures and the interest of society in the prompt and purposeful investigation of an unsolved crime.

The judgment is affirmed.

MR. CHIEF JUSTICE BURGER, concurring.

I agree that the right to counsel attaches as soon as criminal charges are formally made against an accused and he becomes the subject of a "criminal prosecution." Therefore, I join in the Court's opinion and holding. Cf. *Coleman* v. *Alabama*, 399 U. S. 1, 21 (dissenting opinion).

MR. JUSTICE POWELL, concurring in the result.

As I would not extend the *Wade-Gilbert per se* exclusionary rule, I concur in the result reached by the Court.

MR. JUSTICE BRENNAN, with whom MR. JUSTICE DOUGLAS and MR. JUSTICE MARSHALL join, dissenting.

After petitioner and Ralph Bean were arrested, police officers brought Willie Shard, the robbery victim, to a room in a police station where petitioner and Bean were seated at a table with two other police officers. Shard testified at trial that the officers who brought him to the

[8] In view of our limited grant of certiorari, we do not consider whether there might have been a deprivation of due process in the particularized circumstances of this case. That question remains open for inquiry in a federal habeas corpus proceeding.

room asked him if petitioner and Bean were the robbers and that he indicated they were. The prosecutor asked him, "And you positively identified them at the police station, is that correct?" Shard answered, "Yes." Consequently, the question in this case is whether, under *Gilbert* v. *California*, 388 U. S. 263 (1967), it was constitutional error to admit Shard's testimony that he identified petitioner at the pretrial station-house showup when that showup was conducted by the police without advising petitioner that he might have counsel present. *Gilbert* held, in the context of a post-indictment lineup, that "[o]nly a *per se* exclusionary rule as to such testimony can be an effective sanction to assure that law enforcement authorities will respect the accused's constitutional right to the presence of his counsel at the critical lineup." *Id.*, at 273. I would apply *Gilbert* and the principles of its companion case, *United States* v. *Wade*, 388 U. S. 218 (1967), and reverse.[1]

In *Wade*, after concluding that the lineup conducted in that case did not violate the accused's right against self-incrimination, *id.*, at 221–223,[2] the Court addressed

[1] There is no room here for the application of the harmless-error doctrine. Because the admission of Shard's testimony about his showup identification thus requires reversal, there is no need for me to consider whether a remand would otherwise be necessary to afford the State an opportunity to demonstrate that Shard's in-court identification of petitioner, if that is what it was, see *ante*, at 686 n. 3, had an independent source. See *United States* v. *Wade*, 388 U. S. 218, 239–242 (1967); *Gilbert* v. *California*, 388 U. S. 263, 272 (1967).

[2] The plurality asserts that in view of that holding in *Wade*, "the doctrine of *Miranda* v. *Arizona*, 384 U. S. 436, has no applicability whatever to the issue before us." *Ante*, at 688. That assertion is necessary for the plurality because *Miranda* requires the presence of counsel before "the time that adversary judicial proceedings have been initiated against" the accused. *Id.*, at 688. The assertion is nonetheless erroneous, for *Wade* specifically relied upon *Miranda* in establishing the constitutional principle that controls the applicability of the Sixth Amendment guarantee of the right to counsel at pretrial confrontations. See 388 U. S., at 226–227.

the argument "that the assistance of counsel at the lineup was indispensable to protect Wade's most basic right as a criminal defendant—his right to a fair trial at which the witnesses against him might be meaningfully cross-examined," *id.*, at 223–224. The Court began by emphasizing that the Sixth Amendment guarantee "encompasses counsel's assistance whenever necessary to assure a meaningful 'defence.'" *Id.*, at 225. After reviewing *Powell* v. *Alabama*, 287 U. S. 45 (1932); *Hamilton* v. *Alabama*, 368 U. S. 52 (1961); and *Massiah* v. *United States*, 377 U. S. 201 (1964), the Court, 388 U. S., at 225, focused upon two cases that involved the right against self-incrimination:

> "In *Escobedo* v. *Illinois*, 378 U. S. 478, we drew upon the rationale of *Hamilton* and *Massiah* in holding that the right to counsel was guaranteed at the point where the accused, prior to arraignment, was subjected to secret interrogation despite repeated requests to see his lawyer. We again noted the necessity of counsel's presence if the accused was to have a fair opportunity to present a defense at the trial itself . . . ." *United States* v. *Wade*, 388 U. S., at 225–226.[3]

[3] The plurality asserts that "*Escobedo* is not apposite here." *Ante*, at 689. It was, of course, "apposite" in *Wade*. Hence, to say that *Johnson* v. *New Jersey*, 384 U. S. 719, 733–734 (1966), a case decided before *Wade*, "limited the holding of *Escobedo* to its own facts," *ante*, at 689, even if true, is to say nothing at all that is relevant to the present case. The plurality also utilizes *Johnson* for the proposition "that the 'prime purpose' of *Escobedo* was not to vindicate the constitutional right to counsel as such, but, like *Miranda*, 'to guarantee full effectuation of the privilege against self-incrimination . . . .'" *Ibid.* In view of *Wade*'s specific reliance upon *Escobedo* and *Miranda*, that, obviously, is no distinction either. Moreover, it implies that the purpose of *Wade* was "to vindicate the constitutional right to counsel as such." That was not the purpose of *Wade*, as my extended summary of the opinion demonstrates.

> "[I]n *Miranda* v. *Arizona*, 384 U. S. 436, the rules established for custodial interrogation included the right to the presence of counsel. The result was rested on our finding that this and the other rules were necessary to safeguard the privilege against self-incrimination from being jeopardized by such interrogation." *Id.*, at 226.

The Court then pointed out that "nothing decided or said in the opinions in [*Escobedo* and *Miranda*] links the right to counsel only to protection of Fifth Amendment rights." *Ibid.* To the contrary, the Court said those decisions simply reflected the constitutional

> "principle that in addition to counsel's presence at trial, the accused is guaranteed that he need not stand alone against the State at any stage of the prosecution, formal or informal, in court or out, where counsel's absence might derogate from the accused's right to a fair trial. The security of that right is as much the aim of the right to counsel as it is of the other guarantees of the Sixth Amendment . . . ." *Id.*, at 226–227.

This analysis led to the Court's formulation of the controlling principle for pretrial confrontations:

> "In sum, the principle of *Powell* v. *Alabama* and succeeding cases requires that we scrutinize *any* pretrial confrontation of the accused to determine whether the presence of his counsel is necessary to preserve the defendant's basic right to a fair trial as affected by his right meaningfully to cross-examine the witnesses against him and to have effective assistance of counsel at the trial itself. It calls upon us to analyze whether potential substantial prejudice to defendant's rights inheres in the particular confrontation and the ability of counsel to help avoid that prejudice." *Id.*, at 227 (emphasis in original).

It was that constitutional principle that the Court applied in *Wade* to pretrial confrontations for identification purposes. The Court first met the Government's contention that a confrontation for identification is "a mere preparatory step in the gathering of the prosecution's evidence," much like the scientific examination of fingerprints and blood samples. The Court responded that in the latter instances "the accused has the opportunity for a meaningful confrontation of the Government's case at trial through the ordinary processes of cross-examination of the Government's expert witnesses and the presentation of the evidence of his own experts." The accused thus has no right to have counsel present at such examinations: "they are not critical stages since there is minimal risk that his counsel's absence at such stages might derogate from his right to a fair trial." *Id.*, at 227–228.

In contrast, the Court said, "the confrontation compelled by the State between the accused and the victim or witnesses to a crime to elicit identification evidence is peculiarly riddled with innumerable dangers and variable factors which might seriously, even crucially, derogate from a fair trial." *Id.*, at 228. Most importantly, "the accused's inability effectively to reconstruct at trial any unfairness that occurred at the lineup may deprive him of his only opportunity meaningfully to attack the credibility of the witness' courtroom identification." *Id.*, at 231–232. The Court's analysis of pretrial confrontations for identification purposes produced the following conclusion:

> "Insofar as the accused's conviction may rest on a courtroom identification in fact the fruit of a suspect pretrial identification which the accused is helpless to subject to effective scrutiny at trial, the accused is deprived of that right of cross-ex-

> amination which is an essential safeguard to his right to confront the witnesses against him. *Pointer* v. *Texas*, 380 U. S. 400. And even though cross-examination is a precious safeguard to a fair trial, it cannot be viewed as an absolute assurance of accuracy and reliability. Thus in the present context, where so many variables and pitfalls exist, the first line of defense must be the prevention of unfairness and the lessening of the hazards of eyewitness identification at the lineup itself. The trial which might determine the accused's fate may well not be that in the courtroom but that at the pretrial confrontation, with the State aligned against the accused, the witness the sole jury, and the accused unprotected against the overreaching, intentional or unintentional, and with little or no effective appeal from the judgment there rendered by the witness—'that's the man.'" *Id.*, at 235–236.

The Court then applied that conclusion to the specific facts of the case. "Since it appears that there is grave potential for prejudice, intentional or not, in the pretrial lineup, which may not be capable of reconstruction at trial, and since presence of counsel itself can often avert prejudice and assure a meaningful confrontation at trial, there can be little doubt that for Wade the post-indictment lineup was a critical stage of the prosecution at which he was 'as much entitled to such aid [of counsel] . . . as at the trial itself.'" *Id.*, at 236–237.

While it should go without saying, it appears necessary, in view of the plurality opinion today, to re-emphasize that *Wade* did not require the presence of counsel at pretrial confrontations for identification purposes simply on the basis of an abstract consideration of the words "criminal prosecutions" in the Sixth Amendment. Counsel is required at those confrontations because "the

dangers inherent in eyewitness identification and the suggestibility inherent in the context of the pretrial identification," *id.*, at 235,[4] mean that protection must be afforded to the "most basic right [of] a criminal defendant—his right to a fair trial at which the witnesses against him might be meaningfully cross-examined," *id.*, at 224. Indeed, the Court expressly stated that "[l]egislative or other regulations, such as those of local police departments, which eliminate the risks of abuse and unintentional suggestion at lineup proceedings and the impediments to meaningful confrontation at trial may also remove the basis for regarding the stage as 'critical.'" *Id.*, at 239; see *id.*, at 239 n. 30; *Gilbert* v. *California*, 388 U. S., at 273. Hence, "the initiation of adversary judicial criminal proceedings," *ante*, at 689, is completely irrelevant to whether counsel is necessary at a pretrial confrontation for identification in order to safeguard the accused's constitutional rights to confrontation and the effective assistance of counsel at his trial.

In view of *Wade*, it is plain, and the plurality today does not attempt to dispute it, that there inhere in a con-

[4] The plurality refers to "occasions during the course of a criminal investigation when the police do abuse identification procedures" and asserts that "[s]uch abuses are not beyond the reach of the Constitution." *Ante*, at 690. The constitutional principles established in *Wade*, however, are not addressed solely to police "abuses," as *Wade* explicitly pointed out:

"The few cases that have surfaced therefore reveal the existence of a process attended with hazards of serious unfairness to the criminal accused and strongly suggest the plight of the more numerous defendants who are unable to ferret out suggestive influences in the secrecy of the confrontation. We do not assume that these risks are the result of police procedures intentionally designed to prejudice an accused. Rather we assume they derive from the dangers inherent in eyewitness identification and the suggestibility inherent in the context of the pretrial identification." 388 U. S., at 234–235.

frontation for identification conducted after arrest[5] the identical hazards to a fair trial that inhere in such a confrontation conducted "after the onset of formal prosecutorial proceedings." *Id.*, at 690. The plurality apparently considers an arrest, which for present purposes we must assume to be based upon probable cause, to be nothing more than part of "a routine police investigation." *ibid.*, and thus not "the starting point of our whole system of adversary criminal justice," *id.*, at 689.[6] An arrest, according to the plurality, does not face the accused "with the prosecutorial forces of organized society," nor immerse him "in the intricacies of substantive and procedural criminal law." Those consequences ensue, says the plurality, only with "[t]he initiation of judicial criminal proceedings," "[f]or it is only then that the government has committed itself to prosecute, and only then that the adverse positions of government and defendant have solidified." *Ibid.*[7] If these propositions do not amount to

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[5] This case does not require me to consider confrontations that take place before custody, see, *e. g.*, *Bratten* v. *Delaware*, 307 F. Supp. 643 (Del. 1969); *People* v. *Cesarz*, 44 Ill. 2d 180, 255 N. E. 2d 1 (1969); *State* v. *Moore*, 111 N. J. Super. 528, 269 A. 2d 534 (1970), nor accidental confrontations not arranged by the police, see, *e. g.*, *United States* v. *Pollack*, 427 F. 2d 1168 (CA5 1970); *State* v. *Bibbs*, 461 S. W. 2d 755 (Mo. 1970), nor on-the-scene encounters shortly after the crime, see, *e. g.*, *Russell* v. *United States*, 133 U. S. App. D. C. 77, 408 F. 2d 1280 (1969); *United States* v. *Davis*, 399 F. 2d 948 (CA2 1968).

[6] Cf. *Miranda* v. *Arizona*, 384 U. S. 436, 477 (1966) (emphasis added):

"The principles announced today deal with the protection which must be given to the privilege against self-incrimination when the individual is first subjected to police interrogation *while in custody at the station or otherwise deprived of his freedom of action in any significant way. It is at this point that our adversary system of criminal proceedings commences,* distinguishing itself at the outset from the inquisitorial system recognized in some countries."

[7] The plurality concludes that "[i]t is this point, therefore, that marks the commencement of the 'criminal prosecutions' to which

"mere formalism," *ibid.*, it is difficult to know how to characterize them.[8] An arrest evidences the belief of the police that the perpetrator of a crime has been caught. A post-arrest confrontation for identification is not "a mere preparatory step in the gathering of the prosecution's evidence." *Wade, supra,* at 227. A primary, and frequently sole, purpose of the confrontation for identification at that stage is to accumulate proof to buttress the conclusion of the police that they have the offender in hand. The plurality offers no reason, and I can think of none, for concluding that a post-arrest confrontation for identification, unlike a post-charge confrontation, is not among those "critical confrontations of the accused by the prosecution at pretrial proceedings where the results might well settle the accused's fate and reduce the trial itself to a mere formality." *Id.*, at 224.

The highly suggestive form of confrontation employed in this case underscores the point. This showup was particularly fraught with the peril of mistaken

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alone the explicit guarantees of the Sixth Amendment are applicable." *Ante*, at 690. This Court has taken the contrary position with respect to the speedy-trial guarantee of the Sixth Amendment: "Invocation of the speedy trial provision thus need not await indictment, information, or other formal charge. But we decline to extend the reach of the amendment to the period prior to arrest." "In the case before us, neither appellee was arrested, charged, or otherwise subjected to formal restraint prior to indictment. It was this event, therefore, which transformed the appellees into 'accused' defendants who are subject to the speedy trial protections of the Sixth Amendment." *United States* v. *Marion*, 404 U. S. 307, 321, 325 (1971).

[8] As the California Supreme Court pointed out, with an eye toward the real world, "the establishment of the date of formal accusation as the time wherein the right to counsel at lineup attaches could only lead to a situation wherein substantially all lineups would be conducted prior to indictment or information." *People* v. *Fowler*, 1 Cal. 3d 335, 344, 461 P. 2d 643, 650 (1969).

identification. In the setting of a police station squad room where all present except petitioner and Bean were police officers, the danger was quite real that Shard's understandable resentment might lead him too readily to agree with the police that the pair under arrest, and the only persons exhibited to him, were indeed the robbers. "It is hard to imagine a situation more clearly conveying the suggestion to the witness that the one presented is believed guilty by the police." *Id.*, at 234. The State had no case without Shard's identification testimony,[9] and safeguards against that consequence were therefore of critical importance. Shard's testimony itself demonstrates the necessity for such safeguards. On direct examination, Shard identified petitioner and Bean not as the alleged robbers on trial in the courtroom, but as the pair he saw at the police station. His testimony thus lends strong support to the observation, quoted by the Court in *Wade*, 388 U. S., at 229, that "[i]t is a matter of common experience that, once a witness has picked out the accused at the line-up, he is not likely to go back on his word later on, so that in practice the issue of identity may (in the absence of other relevant evidence) for all practical purposes be determined there and then, before the trial." Williams & Hammelmann, Identification Parades, Part I, [1963] Crim. L. Rev. 479, 482.

The plurality today "decline[s] to depart from [the] rationale" of *Wade* and *Gilbert*. *Ante*, at 690. The plurality discovers that "rationale" not by consulting those decisions themselves, which would seem to be the appropriate course, but by reading one sentence in *Simmons* v. *United States*, 390 U. S. 377, 382–383 (1968), where no right-to-counsel claim was either asserted or considered. The "rationale" the plurality discovers is, appar-

[9] Bean took the stand and testified that he and petitioner found Shard's traveler's checks and Social Security card two hours before their arrest strewn upon the ground in an alley.

ently, that a post-indictment confrontation for identification is part of the prosecution. The plurality might have discovered a different "rationale" by reading one sentence in *Foster* v. *California*, 394 U. S. 440, 442 (1969), a case decided after *Simmons*, where the Court explained that in *Wade* and *Gilbert* "this Court held that because of the possibility of unfairness to the accused in the way a lineup is conducted, a lineup is a 'critical stage' in the prosecution, at which the accused must be given the opportunity to be represented by counsel." In *Foster*, moreover, although the Court mentioned that the lineups took place after the accused's arrest, it did not say whether they were also after the information was filed against him.[10] Instead, the Court simply pointed out that under *Stovall* v. *Denno*, 388 U. S. 293 (1967), *Wade* and *Gilbert* were "applicable only to lineups conducted after those cases were decided." 394 U. S., at 442. Similarly, in *Coleman* v. *Alabama*, 399 U. S. 1 (1970), another case involving a pre-*Wade* lineup, no member of the Court saw any significance in whether the accused had been formally charged with a crime before the lineup was held.[11]

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[10] In fact, the lineups in *Foster* took place before the information was filed. The crime occurred on January 25, 1966. After the accused was arrested, he was exhibited to the witness in two lineups, both conducted within two weeks of January 25. The information was not filed until March 17. *Foster* v. *California*, No. 47, O. T. 1968, Brief for Respondent 3–8.

[11] In fact, the lineup in *Coleman* took place before the accused were formally charged. The crime occurred on July 24, 1966. The accused were arrested on September 29, and the lineup was held on October 1. The preliminary hearing was not until October 14, and the indictments were not returned until November 11. *Coleman* v. *Alabama*, No. 72, O. T. 1969, Brief for Petitioners 5–7; App. 84; see 399 U. S., at 26 (STEWART, J., joined by BURGER, C. J., dissenting).

On those facts, the plurality opinion adverted to the timing of the lineup only to the extent of pointing out that it was held "about two months after the assault and seven months before petitioners'

The plurality might also have discovered a different "rationale" for *Wade* and *Gilbert* had it examined *Stovall* v. *Denno*, *supra*, decided the same day. In *Stovall*, the confrontation for identification took place one day after the accused's arrest. Although the accused was first brought to an arraignment, it "was postponed until [he] could retain counsel." 388 U. S., at 295. Hence, in the plurality's terms today, the confrontation was held "before the commencement of any prosecution." *Ante*, at 690.[12] Yet in that circumstance the Court in *Stovall*

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trial." *Id.*, at 3 (BRENNAN, J., joined by DOUGLAS, WHITE, and MARSHALL, JJ.). The plurality opinion then simply noted that "[p]etitioners concede that since the lineup occurred before [*Wade* and *Gilbert*] were decided . . . , they cannot invoke the holding of those cases requiring the exclusion of in-court identification evidence which is tainted by exhibiting the accused to identifying witnesses before trial in the absence of counsel." *Id.*, at 3–4.

Mr. Justice Black in his concurring opinion took no notice at all of when the lineup was conducted. Instead, reiterating his view that *Wade* "should be held fully retroactive," he insisted "that petitioners in this pre-*Wade* case were entitled to court-appointed counsel at the time of the lineup in which they participated and that Alabama's failure to provide such counsel violated petitioners' rights under the Sixth and Fourteenth Amendments." *Id.*, at 13. Nor did Mr. Justice Harlan refer to the timing of the lineup in expressing his "dissent from the refusal to accord petitioners the benefit of the *Wade* holding, neither petitioner having been afforded counsel at the police 'lineup' identification." Mr. Justice Harlan's summary of *Wade*, like that of the prevailing opinion, did not limit its "rationale" to post-charge confrontations: "The *Wade* rule requires the exclusion of any in-court identification preceded by a pretrial lineup where the accused was not represented by counsel, unless the in-court identification is found to be derived from a source 'independent' of the tainted pretrial viewing." *Id.*, at 21.

[12] The chain of events in *Stovall* was as follows: The crime occurred on the night of August 23, 1961. The accused was arrested on the afternoon of August 24 and appeared for arraignment on the morning of August 25. The arraignment was postponed until August 31 so that he could retain counsel. The confrontation with the witness took place about noon on August 25. At the arraignment

stated that the accused raised "the same alleged constitutional errors in the admission of allegedly tainted identification evidence that were before us" in *Wade* and *Gilbert* The Court therefore found that the case "provide[d] a vehicle for deciding the extent to which the rules announced in *Wade* and *Gilbert*—requiring the exclusion of identification evidence which is tainted by exhibiting the accused to identifying witnesses before trial in the absence of his counsel—are to be applied retroactively." 388 U. S., at 294. Indeed, the Court's explicit holding was "that *Wade* and *Gilbert* affect only those cases and all future cases which involve confrontations for identification purposes conducted in the absence of counsel after this date. The rulings of *Wade* and *Gilbert* are therefore inapplicable in the present case." *Id.*, at 296. Hence, the accused in *Stovall* did not receive the benefit of the new exclusionary rules because they were not applied retroactively; he was not denied their benefit because his confrontation took place before he had "been formally charged with a criminal offense." *Ante*, at 691. Moreover, in the course of its retroactivity discussion, 388 U. S., at 296–301, the Court repeated the phrase "pretrial confrontations for identification" or its equivalent no less than 10 times. Not once did the Court so much as hint that *Wade* and *Gilbert* applied only to confrontations after the accused "had been indicted or otherwise formally charged with [a] criminal offense." *Ante*, at 684. In fact, at one point the Court summarized *Wade* as holding "that the confrontation [for identification] is a 'critical stage,' and that counsel

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on August 31, the committing magistrate appointed counsel for the accused and set the felony examination for September 1. That examination was never held, for on August 31 the indictment was returned. *Stovall* v. *Denno*, No. 254, O. T. 1966, Brief for Respondent 34.

is required at *all* confrontations." 388 U. S., at 298 (emphasis added).

Wade and *Gilbert*, of course, happened to involve post-indictment confrontations. Yet even a cursory perusal of the opinions in those cases reveals that nothing at all turned upon that particular circumstance.[13] In short, it is fair to conclude that rather than "declin-[ing] to depart from [the] rationale" of *Wade* and *Gilbert*, *ante*, at 690, the plurality today, albeit purporting to be engaged in "principled constitutional adjudication," *id.*, at 688, refuses even to recognize that "rationale." For my part, I do not agree that we "extend" *Wade* and *Gilbert*, *id.*, at 1, by holding that the principles of those cases apply to confrontations for identification conducted after arrest.[14] Because Shard testified at trial

[13] The *Wade* dissenters found no such limitation: "The rule applies to any lineup, to any other techniques employed to produce an identification and *a fortiori* to a face-to-face encounter between the witness and the suspect alone, regardless of when the identification occurs, in time or place, and whether before or after indictment or information." *United States* v. *Wade*, 388 U. S., at 251 (WHITE, J., joined by Harlan and STEWART, JJ., dissenting in part and concurring in part).

[14] The plurality rather surprisingly asserts that "[t]he issue of the applicability of *Wade* and *Gilbert* to pre-indictment confrontation has *severely* divided the courts." *Ante*, at 687 n. 3 (emphasis added). As the plurality's citations reveal, there are decisions from five States, including Illinois, that have refused to apply *Wade* and *Gilbert* to pre-indictment confrontations for identification. Ranged against those five, however, are decisions from at least 13 States. See *People* v. *Fowler*, 1 Cal. 3d 335, 461 P. 2d 643 (1969); *State* v. *Singleton*, 253 La. 18, 215 So. 2d 838 (1968); *Commonwealth* v. *Guillory*, 356 Mass. 591, 254 N. E. 2d 427 (1970); *Palmer* v. *State*, 5 Md. App. 691, 249 A. 2d 482 (1969); *People* v. *Hutton*, 21 Mich. App. 312, 175 N. W. 2d 860 (1970); *Thompson* v. *State*, 85 Nev. 134, 451 P. 2d 704 (1969); *State* v. *Wright*, 274 N. C. 84, 161 S. E. 2d 581 (1968); *State* v. *Isaacs*, 24 Ohio App. 2d 115, 265 N. E. 2d 327 (1970); *Commonwealth* v. *Whiting*, 439 Pa. 205, 266 A. 2d 738 (1970); *In re Holley*, — R. I. —, 268 A. 2d 723 (1970); *Martinez*

about his identification of petitioner at the police station showup, the exclusionary rule of *Gilbert*, 388 U. S., at 272–274, requires reversal.

MR. JUSTICE WHITE, dissenting.

United States v. *Wade*, 388 U. S. 218 (1967), and *Gilbert* v. *California*, 388 U. S. 263 (1967), govern this case and compel reversal of the judgment below.

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v. *State*, 437 S. W. 2d 842 (Tex. Ct. Crim. App. 1969); *State* v. *Hicks*, 76 Wash. 2d 80, 455 P. 2d 943 (1969); *Hayes* v. *State*, 46 Wis. 2d 93, 175 N. W. 2d 625 (1970).

In addition, *every* United States Court of Appeals that has confronted the question has applied *Wade* and *Gilbert* to pre-indictment confrontations. See *United States* v. *Greene*, 139 U. S. App. D. C. 9, 429 F. 2d 193 (1970); *Cooper* v. *Picard*, 428 F. 2d 1351 (CA1 1970); *United States* v. *Ayers*, 426 F. 2d 524 (CA2 1970); *Government of Virgin Islands* v. *Callwood*, 440 F. 2d 1206 (CA3 1971); *Rivers* v. *United States*, 400 F. 2d 935 (CA5 1968); *United States* v. *Broadhead*, 413 F. 2d 1351 (CA7 1969); *United States* v. *Phillips*, 427 F. 2d 1035 (CA9 1970); *Wilson* v. *Gaffney*, 454 F. 2d 142 (CA10 1972). As Chief Judge Lewis, speaking for the Court of Appeals for the Tenth Circuit, put it in the last-cited case:

"In both *Wade* and *Gilbert* the lineups were conducted after indictments had been returned; in the case at bar, the lineup occurred before petitioner had been formally charged. But surely the assistance of counsel, now established as an absolute post-indictment right does not arise or attach because of the return of an indictment. The confrontation of a lineup . . . cannot have a constitutional distinction based upon the lodging of a formal charge. Every reason set forth by the Supreme Court in *Wade* . . . for the assistance of counsel post-indictment has equal or more impact when projected against a pre-indictment atmosphere. We hold that petitioner had a right to counsel at the lineup here considered." *Id.*, at 144.